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ALEXANDER L. STEVAS,
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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

DALLAS COUNTY, TEXAS,

Petitioner

V.

~~CARL THOMAS, ET AL.,~~

~~Sheriff,~~

~~Respondents~~

~~V.~~

DON WILLIAMS

Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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QUESTIONS PRESENTED

I.

WHETHER, FOR PURPOSES OF 42 U.S.C. § 1988, RESPONDENT DONALD WILLIAMS WAS A PREVAILING PARTY WHEN HE FAILED TO RECOVER ON HIS 42 U.S.C. § 1983 CLAIM, BUT DID RECOVER ON HIS STATE LAW TORT CLAIM UNDER PENDENT JURISDICTION.

II.

WHETHER A NON-PARTY COUNTY IS RESPONSIBLE FOR PAYMENT OF AN ATTORNEY FEE AWARD ASSESSED INDIVIDUALLY AGAINST A DEPUTY SHERIFF WHO WAS NOT A HIGH OFFICIAL WHOSE ACTS AND EDICTS MAY FAIRLY BE SAID TO REPRESENT OFFICIAL COUNTY POLICY, WHEN NO POLICY, CUSTOM OR PRACTICE OF THE COUNTY WAS INVOLVED.

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**CIVIL RIGHTS ATTORNEYS FEES IN CASES
RESOLVED ON STATE PENDENT AND
FEDERAL STATUTORY GROUNDS,
130 U. Pa. L. Rev. 488 (1981) 14**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Your Petitioner¹ respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on December 6, 1982, rehearing denied February 4, 1983, styled *Williams v. Thomas, et al.*, No. 81-1376.

¹The Petitioner is Dallas County, Texas. The Respondents are Carl Thomas, former Sheriff of Dallas County, Texas, Joseph Bolt, Larry Smith, George Williams and Donald Williams. Carl Thomas was dismissed from the cause by the District Court, George Williams was dismissed by agreement among the parties.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in *Williams v. Thomas, et al.*, 692 F.2d 1032 (5th Cir.1982). A copy of said opinion is included in Appendix A.

A copy of the Order of the Fifth Circuit denying rehearing is also included in Appendix A.

The Judgment of the United States District Court for the Northern District of Texas, Dallas Division, filed April 2, 1981, is included in Exhibit B. The Memorandum Opinion of the United States District Court for the Northern District of Texas, Dallas Division, Judge Robert M. Hill, Jr., is reported at *Williams v. Thomas, et al.*, 511 F.Supp.535 (N.D.Tx. 1981). A copy of said opinion is also included in Appendix B.

GROUND'S FOR JURISDICTION

The Judgment sought to be reversed was entered by the United States Court of Appeals for the Fifth Circuit on December 6, 1982, and Appellant's Motion for Rehearing was denied February 4, 1983. This petition for certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment VIII

U.S. Constitution Amendment XIV

42 U.S.C. § 1983

42 U.S.C. § 1988

Rules 15(a). Federal Rules of Civil Procedure

These statutes, rules and constitutional provisions are set forth in Appendix C.

STATEMENT OF THE CASE

This case is a suit for damages brought by a prisoner who suffered bruises allegedly caused by a deputy sheriff's throwing him to the floor while investigating an incident that occurred in the "tank" of the Dallas County Jail.

The original Complaint in this case was filed by Donald Williams, pro se, against "Sheriff Carl Thomas, Lt. George Williams, Officer Boat and Officer Smith and Dallas County, Texas". No service was effectuated on Dallas County, Texas. The Complaint was filed in the Northern District of Texas, Dallas Division, on March 27, 1979, under cause number CA 3-79-0385-D.

Williams complained that on February 21, 1979, while he was a prisoner at the Dallas County Jail, he was called out of the "tank" by "Officer Boat" and "Officer Smith" who allegedly slammed him to the wall and then to the floor. Williams alleged the officers did this because they accused him of calling a female officer a "bitch". Williams alleged this was in violation of rights secured to him pursuant to 42 U.S.C. § 1983 and he asked for \$500,000.00 in "compensatory damages and punitive damages . . . against Defendants Carl Thomas, Lt. George Williams, and Officers Boat and Smith".

Williams also asked for \$500,000.00 as "compensatory and punitive damages against the County of Dallas, Texas".

The original Answer was filed by Assistant District Attorney, Gerald A. Banks, of Dallas County, Texas, who answered for Defendants Carl Thomas, Joseph Bolt, Larry Smith and George Williams. Dallas County, as an entity, was neither served nor represented, although named in the original Complaint. "Officer Boat" was never served and did not answer.

Thereafter, Judge Robert Hill appointed counsel to represent Williams and on October 24, 1980, Plaintiff's First Amended Complaint was filed by Robert T. Mowrey, of Locke, Purnell, Boren, Laney and Neely, Attorneys for Donald Williams.

In this Amended Complaint, Williams named as Defendants "Carl Thomas ("Thomas"), George Williams, Larry Smith ("Smith") and Joseph A. Bolt, Sr. ("Bolt")." No mention was made of Dallas County, Texas, nor was relief prayed for against Dallas County, Texas. Joseph A. Bolt, Sr. had not been named in the Original Complaint. Officer Boat, who had been named in the Original Complaint, was not named in the Amended Complaint. In this Amended Complaint, Plaintiff also alleged for the first time a state claim for assault and battery pursuant to the Court's pendent jurisdiction. Williams further alleged the "use of excessive force" constituted "cruel and unusual punishment" in violation of Williams' constitutional rights under the Eighth and Fourteenth Amendments. Plaintiff asked for punitive and compensatory damages and for attorney fees against the above named Defendants.

On or about the 21st day of October, 1980, Plaintiff Donald Williams and Defendants Thomas, Bolt, Smith, and George Williams entered a joint "Pre-Trial Order". In said Order, Dallas County, Texas was not mentioned as a Defendant, nor was any relief requested against Dallas County, Texas. Neither the Amended Complaint nor the Pre-Trial Order make reference to any of the named Defendants being sued in their "official capacities".

Although the Original Complaint listed "in his afficial (sic) capacity" after Carl Thomas' name and placed what the Court of Appeals said could be construed as "ditto" marks after that description in reference to the other named

Defendants (Bolt was not then a named Defendant), no such description was set forth in the Amended Complaint, nor in the Pre-Trial Order. Since Defendant Joseph A. Bolt, Sr. was not named in the Original Complaint there was no claim by Plaintiff that he was sued in his official capacity.

The case proceeded to trial before a jury on or about October 27, 1980. Lt. George Williams was dismissed from the case prior to trial by agreement of the parties. After hearing the evidence, the Court dismissed the action as to Sheriff Carl Thomas,

Because Williams presented no evidence at trial that Sheriff Thomas participated, authorized or ratified the assault and battery, or that he was negligent in his administration of the County Jail, or in his hiring or supervision of deputies, the Court dismissed all claims against Thomas.

Appendix B, at page 13-14.

Thereafter, the Court presented its charge to the jury. The jury returned a verdict in answer to ten special interrogatories. The jury found as follows:

Section 1983 Claim

1. (a) Bolt used force in excess of reasonable force.*
(b) Smith did not use force in excess of reasonable force.
2. Bolt acted in reasonable good faith.

*Although the District Court and the Court of Appeals stated that the jury found that Bolt used excessive force against Williams, it is at least a generous, if not inaccurate, paraphrase of the interrogatory and its answer. The interrogatories are in Appendix D, page 10-15.

3. Bolt's use of unreasonable force was a proximate cause of Williams' injuries.
4. Williams was entitled to no monetary compensation for Bolt's use of unreasonable force.
5. In using unreasonable force Bolt acted without malice.
6. Based on its finding that Bolt acted without malice, the jury was not required to make a finding as to punitive damages.

Assault and Battery Claim

7. (a) Bolt committed an assault and battery against Williams, and such assault and battery was a proximate cause of Williams' injuries, though inflicted without malice.
8. In committing an assault and battery against Williams, Bolt was not acting in self-defense.
9. Williams was entitled to Five Hundred Dollars (\$500) as compensation for Bolt's assault and battery against him.
10. Based on its finding that Bolt acted without malice, the jury was not required to make a finding as to punitive damages.

See Appendix D at page 10-15.

Following the jury findings, Plaintiff moved for entry of a judgment and the Court ruled in a Memorandum Opinion and Order that as a matter of law, Defendant Bolt was not entitled to the "good faith" defense found by the jury. Although the jury found that Bolt used unreasonable force, it did not damage Williams enough to measure in monetary damages in relation to his 42 U.S.C. § 1983 claim. If the

answer to Interrogatory No. 4 conflicts with the answers to Interrogatories No. 2 and 3, any conflict was waived by Plaintiff in not assigning error. Oddly enough, although the jury found no monetary damages as a result of the unreasonable force, Williams did recover \$500.00 on his pendent assault or battery claim which arose out of the same transaction. The jury apparently believed damages could be awarded as a result of assault or battery even if not caused by "unreasonable force", or else the issues are in conflict. Neither party complained of any conflict on appeal, however, and thereby waived same if it existed. The trial Court recognized that recovering on his assault and battery claim did not mean that he prevailed on his civil rights claim, a prerequisite to recovery of attorney fees under 42 U.S.C. § 1988. See Appendix B at page 21. However, the trial Court found that the assault and battery recovery coupled with the jury's finding that excessive force was used (albeit, absent monetary damages) supported the conclusion that Williams "by and large" prevailed and was therefore entitled to attorney's fees pursuant to 42 U.S.C. § 1988. See Appendix B at page 22. It is not clear what the Court meant by the term "by and large". Perhaps it could mean that Williams would have prevailed had he been damaged. In this case, however, the jury's finding of no damage was not attacked on appeal or otherwise. Further, the Court instructed the jury that,

Even though it may be determined that a detention officer in the course of his duties did use excessive force against a prisoner, he will nevertheless have a complete defense to his actions in a civil suit such as this one if he can show that under the circumstances and acting as an ordinary and prudent detention officer he entertained a good faith belief that his actions were lawful and it was reasonable, under the circumstances surrounding his actions, to believe that those actions were lawful.

See Appendix D at page 7. The jury did find in answer to Interrogatory No. 2 that Bolt "did act in reasonable good faith". See Appendix D at page 11. Therefore, by the very terms of the Court's charge on the civil rights law, Bolt had "... a complete defense to his actions in a civil suit such as this one. ...". *Id.*

The trial Court went on to determine that since Bolt was sued *individually*, not in his *official* capacity, and since the County was never before the Court, the assessment of attorney fees had to be against Bolt himself. See Appendix B at page 22. The Court determined that \$2,500.00 was a reasonable attorneys fee in light of customary fees in the area, taking into consideration the relative inexperience of Williams' counsel and the fact that the fees award was five times greater than the damage award. See Appendix B at page 22-23.

Thereafter, Defendant Bolt appealed to the United States Court of Appeals for the Fifth Circuit. Plaintiff cross-appealed the amount of attorney fees. The dismissal of Carl Thomas by the District Court was not complained of on appeal.

The Court of Appeals held that Bolt's failure to object to the trial court's failure to submit the good faith defense in relation to the assault and battery claim resulted in waiver of Bolt's complaint on appeal concerning the charge and the good faith instruction. See Appendix A at page 8.

The Fifth Circuit went on to hold that the trial court entered judgment for Williams based upon the state assault and battery claim, rather than the Section 1983 claim.

Thus, even if the District Court erred in refusing to apply the good faith defense to the Section 1983 claim,

and this court expresses no opinion on this matter, Williams would still be entitled to recover under the state assault and battery action.

See Appendix A at page 9.

The Court of Appeals noted that courts often affirm a judgment on a pendent noncivil rights claim when to do so will allow it to avoid a decision on a constitutional issue.³ *Id.*

The Court of Appeals found the award of fees by the trial court to be too low, and then addressed the issue concerning whether or not Bolt was individually liable. The Circuit Court disagreed with the lower court's conclusion that Bolt was sued in his individual capacity. See Appendix A at page 18. In so holding, the Court made much of the fact that Williams filed his Original Complaint "pro se", therefore, attorney fees against an entity should not be disallowed, "... because [of] Plaintiff's failure to use the 'magic' words 'in his official capacity' ".⁴

Further, the Court of Appeals completely overlooked the fact that Defendant Bolt was not sued in the "pro se" complaint. The Court of Appeals found that since that Court

³However, the trial court specifically avoided that route, stating, "In the instant case, the Court did not preclude the consideration of Williams' constitutional claims or make consideration of them in any way contingent on the outcome of Williams' assault and battery claims." Appendix B at page 21.

⁴The Circuit Court made no mention of the fact that an Amended Complaint filed by the Court-appointed attorneys for Plaintiff, who were associates in a large Dallas law firm, also failed to make this designation, as did the Pre-Trial Order. The Court apparently did not recognize the rule that Pre-Trial Orders constitute the position of the parties at trial. *United States v. Joyce*, 511 F.2d 1127 (9th Cir. 1975); *United States v. First National Bank of Circle*, 652 F.2d 882 (9th Cir. 1981).

believed Bolt *was* sued in his official capacity, the County of Dallas was responsible for payment of these attorney fees, completely ignoring the fact that Defendant Bolt is not a high official whose acts and edicts constitute policy. See Appendix A at page 20.

Motion for Rehearing was denied on February 4, 1983. See Appendix A at page 1.

In his Amended Complaint, Plaintiff alleged jurisdiction pursuant to 28 U.S.C. § 1343 and pendent state jurisdiction.

The Fifth Circuit assumed jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING WRIT

The Court should grant a review on writ of certiorari of the judgment of the United States Court of Appeals for the Fifth Circuit because the Fifth Circuit decided an important issue of federal law which has not been, but should be, settled by this Court. The Fifth Circuit held that Respondent Donald Williams was a prevailing party for purposes of 42 U.S.C. § 1988 even though he failed to recover on his 42 U.S.C. [1983 claim, but did recover on his pendent state law tort claim. If this expansion of 42 U.S.C. § 1983 is not reversed, then it is likely that *any* tort involving a state employee could result in allegations of constitutional violation pursuant to 42 U.S.C. 1983. This is clearly not the intent of 42 U.S.C. § 1983 or of the interpretations of that statute by this Court. *Paul v. Davis*, 424 U.S. 693 (1976), *Parratt v. Taylor*, 451 U.S. 527 (1981). The Court should also grant review because the Fifth Circuit held a county liable for attorney fees assessed individually against a deputy sheriff who was not a high official whose acts and edicts may be said to represent official policy, when no policy, custom

or practice of the county or of any policymaking official of the county authorized, permitted or ratified the deputy's acts in question. Said holding by the Fifth Circuit is contrary to the teaching of *Hanrahan v. Hampton*, 446 U.S. 754 (1980) and *Monell v. Department of Social Services of the City of New York, et al.*, 436 U.S. 658 (1978). The decision is also in conflict with *Dean v. Gladney*, 621 F.2d 1331 (5th Cir.1980). This conflict should be resolved.

I. WHETHER, FOR PURPOSES OF 42 U.S.C. § 1988, RESPONDENT DONALD WILLIAMS WAS A PREVAILING PARTY WHEN HE FAILED TO RECOVER ON HIS 42 U.S.C. § 1983 CLAIM, BUT DID RECOVER ON HIS STATE LAW TORT CLAIM UNDER PENDENT JURISDICTION.

It was the intent of Congress to allow recovery of attorney fees only to a party who has established his entitlement to some relief on the merits of his claim either in the trial court or on appeal. *Hanrahan v. Hampton*, 446 U.S. 754 (1980). Respondent Williams recovered nothing as a result of his civil rights claims, therefore, he is not a prevailing party within the meaning of 42 U.S.C. § 1988.

In determining whether or not a party "prevailed" for purposes of 42 U.S.C. § 1988, courts must determine whether the basic objectives Plaintiff seeks from his lawsuit have been achieved. *Chicano Police Officer's Association v. Stover*, 624 F.2d 127, 131 (10th Cir.1980).

The instant case is a suit for damages. Plaintiff did not seek, nor did the Court find the need for, any reforms in the procedures and practices at the Dallas County Jail. There was no request for injunctive or declaratory relief. Rather, Plaintiff was seeking monetary compensation only,

based on alternative theories of recovery: a Section 1983 claim for alleged use of excessive force, and a pendent state claim for assault and battery. After finding that Bolt used force in excess of reasonable force, and that Bolt acted in reasonable good faith, the jury was asked:

QUESTION NO. 4

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Williams for the damages which were proximately caused by the use of excessive force against him?

Answer in dollars and cents, if any, as to each defendant as to whom you answered Question No. 3 "He did suffer."

ANSWER:

Bolt: NONE

Smith:

Interrogatory No. 4, where the question of no damages was answered by the jury, was not submitted dependent upon the good faith question. The jury simply found there were no damages.

The jury awarded *no* damages to Respondent Williams based upon this interrogatory⁵. Therefore, the trial court's conclusion that Respondent "by and large" prevailed on his § 1983 claim is erroneous. See Appendix B at page 22. The jury did award \$500.00 in compensatory damages as to the assault and battery issue, which was a State law, not a Section 1983, claim. See Appendix D at page 14.

⁵The jury had already found no liability on the part of the other named defendants.

The Court of Appeal's holding that Respondent prevailed on his constitutional claim is equally clearly erroneous. See Appendix A at page 11. The Court of Appeals did not address the fact that there was an explicit finding by the jury that Williams had suffered no damages as a result of his Section 1983 claim. See Appendix A at page 10-11. The Court of Appeals found that it need not reach the question of the Trial Court's retraction of the jury's finding of good faith, in order to determine the issues raised on appeal. The Court of Appeals found it "significant that the District Court rendered judgment for Williams based upon his successful state pendent tort action." *Id.* In so stating, the Court of Appeals cited as authority an "intimation" in *Maher v. Gagne*, 448 U.S. 122 (1980) that fees are recoverable when a party prevails on a substantial claim that is pendent to a civil rights claim. The Court went on to cite a series of cases that allowed recovery when the Court affirmed judgment on a pendent claim in order to avoid an unnecessary decision on a difficult constitutional issue. *Id.* These cases are inapposite, since the trial court made clear that,

[i]n the instant case, the Court did not preclude the consideration of Williams' constitutional claims or make consideration of them in any way contingent on the outcome of Williams' assault and battery claims.

See Appendix B at page 21.

Nor did the Court make the assault and battery claims contingent on the constitutional claim. Therefore, Respondent was erroneously held to be a prevailing party for purposes of 42 U.S.C. § 1988 since the only claim on which he recovered was a pendent state tort claim, and in spite of the fact that there was an explicit jury finding that Respondent was not entitled to damages on his constitutional claim. There was no injunctive relief nor damages awarded under

the Section 1983 claim, so, rhetorically, what did he recover on the Section 1983 claim? Obviously, nothing. This Court has made it clear that one is not a prevailing party if he fails to recover on the merits of his claim. *Hanrahan v. Hampton*, supra. Plaintiff was left only with a nominal recovery on a state pendent claim of assault and battery. This Court in *Maier v. Gagne*, 448 U.S. 122, 130 (1980) noted:

[i]n this case, there is no need to reach the question whether a federal court could award attorney's fees against a State based on a statutory, non-civil-rights claim.

In their concurring opinion, Justice Powell, Chief Justice Burger and Justice Rehnquist specifically noted that question had been reserved. Due to the importance of that question, and to the unwarranted expansion of attorney fee awards beyond the Congressional intent of 42 U.S.C. § 1988 by the Fifth Circuit in the instant case, that issue should now be resolved, and this Court should grant this petition for a writ of certiorari.

The plain language of the attorney fees statute gives no indication that Congress intended for recovery on a pendent claim alone to result in a fee award, 42 U.S.C. § 1988. See Appendix C at page 3. The plain language of any statute is generally determinative in statutory interpretations. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978). However, as this Court has noted, the legislative history is entirely consistent with the plain language of the statute. *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980). See further, "Civil Rights Attorney Fees in Cases Resolved on State Pendent and Federal Statutory Grounds", 130 U. Pa. L. Rev. 448 (1981). Although the House Report recognized

that fees might be awarded in pendent actions where the Courts are reluctant to resolve a difficult Constitutional issue if a non-Constitutional issue is dispositive, even this expansive approval does not anticipate the situation where the Constitutional issues *were* considered, but Plaintiff prevailed only on a state pendent claim, as in the case at bar. *Id.*, and H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n 7 (1976).

In the House debates, Mr. Drinan recognized that, "[t]his bill would authorize State and Federal Courts to award counsel fees in actions brought under specified sections of the U. S. Code relating to *civil and constitutional rights*." 122 CONG. REC. 35122 (1976), emphasis added. Drinan goes on to note, "[i]f *Federal* laws providing for the protection of *civil and constitutional* rights are to be fully enforced, Congress must provide effective remedies for the vindication of those guarantees." 122 CONG. REC. 35123 (1976), emphasis added.

Nothing in the legislative history of the Act suggests it was the intent of Congress to award fees for the vindication of *any* tort committed by a state officer. Rather, in order to come within the prevailing party standard, the party must vindicate a constitutional right, the deprivation of which caused him an injury. *Baker v. McCollan*, 443 U.S. 137, 146 (1979). The jury found there was no injury or damage in the case at bar. While the Court of Appeals held that the Section 1983 claim and the assault or battery claim did arise "...out of a common nucleus of operative facts...", the jury found no damages as a result of excessive force but did find damages as a result of the assault or battery. While the first claim (Section 1983) is based on excessive force, the second claim (assault or battery)⁶ is not. *Haywood v.*

⁶The issue was based on assault or battery, not assault and battery. See Appendix D at page 13.

Ball, 634 F.2d 740, 743 (4th Cir. 1980); *Luria Bros. & Company, Inc. v. Allen*, 672 F.2d 347, 357 (3rd Cir.1982).

As this Court cautioned in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 1917 (1981), regarding the Court's refusal to expand Section 1983 to encompass a misdirection of a prisoner's mail, thereby converting that act into a violation of the Fourteenth Amendment,

[p]resumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a Constitutional violation under § 1983. Such reasoning 'would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.'

Citing *Paul v. Davis*, 424 U.S. 693, 701. As will be more fully argued under the second issue of this petition, *infra*, Respondent failed to show "the sort of abuse of government power that is necessary to raise an ordinary tort by a government agent to the stature of a violation of the Constitution." *Williams v. Kelley*, 624 F.2d 695, 697 (5th Cir.1980), cert. den. 451 U.S. 1019.

This failure is evident in the jury's finding that Plaintiff was entitled to no damages as a result of his Constitutional claim, *supra*. As the Court noted in *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir.1980), nothing in 42 U.S.C. § 1988, its legislative history, or decisions on the subject "requires or justifies" an award of attorney fees where the Plaintiff recovered on his pendent claim, but failed to recover on his claim under Section 1983. See further, *Luria Brothers and Company, Inc. v. Allen*, 672 F.2d 347, 357 (3rd Cir.1982), holding failure to recover under Section 1983 claim precludes an award of attorney fees under 42 U.S.C. § 1988, despite recovery on a pendent claim.

In the case of *Kincaid v. Rusk*, 670 F.2d 737, 745-746 (7th Cir.1982), the Court recognized,

[b]ecause the purpose of section 1983 is to *compensate* for the injuries resulting from a deprivation of constitutional rights, Kincaid must demonstrate that the restrictions found unlawful here caused some *compensable injury*. (emphasis added)

As in the *Kincaid* case, Respondent Williams in the present case failed to prove any damages arose from his alleged Constitutional deprivations. Therefore, attorney fees should not have been allowed pursuant to 42 U.S.C. § 1988. The question this Court specifically reserved in *Maher v. Gagne*, supra, that is, whether a party who recovers solely on a pendent state claim is entitled to attorney fees under 42 U.S.C. § 1988, should be answered and this petition for a writ of certiorari should be granted. The Fifth Circuit's holding that Respondent Williams was the prevailing party in *Williams v. Thomas*, 692 F.2d 1032 (5th Cir.1982) should be reversed.

II. WHETHER A NON-PARTY COUNTY IS RESPONSIBLE FOR PAYMENT OF AN ATTORNEY FEE AWARD ASSESSED INDIVIDUALLY AGAINST A DEPUTY SHERIFF WHO WAS NOT A HIGH OFFICIAL WHOSE ACTS AND EDICTS MAY FAIRLY BE SAID TO REPRESENT OFFICIAL COUNTY POLICY, WHEN NO POLICY, CUSTOM OR PRACTICE OF THE COUNTY WAS INVOLVED.

As set out fully in the Statement of the Case, hereinabove, Plaintiff failed to name Dallas County, Texas, as a party defendant in the Amended Complaint filed by his court appointed attorneys on or about October 24, 1980. Neither

did Plaintiff ask for relief against Dallas County, Texas, nor did he sue or ask for relief against the named Defendants in their official capacities. The Pre-Trial Order entered on October 21, 1980, also failed to request relief against Dallas County, Texas, and to seek relief against Defendants in their official capacities.

It is well settled that when a petition is amended, the Court proceeds on that amended petition. *Washer v. Bullit County*, 110 U.S. 558, 561-562 (1883). Pursuant to Rule 15a, Federal Rules of Civil Procedure, Plaintiff amended his petition in the case presently before the bar. The Second Circuit has noted:

[i]t is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect.

International Controls Corp. v. Vesco, 556 F.2d 665, 668 (2nd Cir.1977), cert. den. 434 U.S. 1014.

Even if this were not the case, Plaintiff failed to include Dallas County, Texas, and to seek recovery against the named Defendants in their official capacities in the Pre-Trial Order, on which the trial was conducted. *United States v. Joyce*, 511 F.2d 1127, 1130 (9th Cir.1975); *United States v. First National Bank of Circle*, 652 F.2d 882, 886 (9th Cir.1981). Therefore, the suit was not tried against the County or against the named Defendants in their official capacities. See Appendix A at page 18.

The Trial Court held Bolt was sued *individually*, not in his official capacity and that Dallas County was never before the Court; therefore, the attorney fees must be against Bolt himself, not the County. See Appendix B at page 22.

The Court of Appeals concluded that Bolt *was* sued in his official capacity, reasoning that the original pro se complaint was to be held to the lesser standard of pleading allowed pro se complainants. The Court of Appeals overlooked the fact that Defendant Bolt was not named as a party in the Original Complaint. The Court of Appeals made no reference to either the Amended Complaint or the Pre-Trial Order. See Appendix A at page 18-19. As noted under the Statement of the Case, Sheriff Carl Thomas was dismissed from the cause by the Court.

Regarding the dismissal, the trial Court held,

[i]n the instant case the jury found that Deputy Bolt committed an assault and battery against Williams . . . [Sheriff] Thomas cannot be held liable on a theory that a Sheriff is absolutely responsible for all acts of his deputies. . .

See Appendix B at pages 13-14. In the case of *Dean v. Gladney*, 621 F.2d 1331 (5th Cir.1980) cert. den. 450 U.S. 983, the Court of Appeals reached an opposite conclusion from the conclusion it reached in the case at bar. In the *Dean v. Gladney* case (a deputy sheriff misconduct case) the Court of Appeals recognized that the County was not liable for attorney fees on the basis of *respondeat superior*, and since there was no policy to provide a causal connection between the acts of the deputy sheriff and the County, there could be no Section 1983 recovery. The County in that case had been dismissed (in the case at bar, the County was not a party) and the Court of Appeals held attorney fees could not be taxed against it. More recently, the Sixth Circuit held that a Section 1983 action cannot lie against a police supervisor for failure to prevent police misconduct, absent a showing of direct responsibility for that action.

Dunn v. State of Tennessee, 697 F.2d 121, 128 (6th Cir. 1982). See further, *Fisher v. Washington Metro. Area Transit Authority, et al.*, 690 F.2d 1133, 1143 (4th Cir.1982). No such showing was made in the instant case.

It was never even alleged that the deputy responsible for the acts in question was implementing a policy of the Sheriff or County, or that the deputy was acting pursuant to governmental "custom" when he allegedly committed the acts complained of by Respondent. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978). Rather, at most, a tort was committed by a deputy who was clearly not a person whose acts or edicts may fairly be said to represent official policy. *Id.* See further, *Dunn v. State of Tennessee*, *supra*.

Certainly, it is well established that there is no *respondent superior* liability under Section 1983 claims. *Id.* at 691; *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980).

Regarding the issue of municipal liability, this Court has recently held that,

. . . official policy must be 'the moving force of the constitutional violation' in order to establish the liability of a government body under Section 1983.

Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 454 (1981). In the case at bar, Respondent Williams neither alleged nor proved such a policy. Further, there was an explicit finding by the trial court that no evidence was offered at trial that Sheriff Thomas "participated, authorized or ratified the assault and battery, or that he was negligent in his administration of the County Jail or in his hiring or supervision of deputies . . .". See Appendix B at page 13-14. Because of his lack of involvement, Thomas was dismissed from the suit. Said dismissal was not questioned on appeal. See Appendix A at page 4.

Therefore, the case presently facing this Court supports the following conclusions:

- a. There was no county custom or policy authorizing, permitting or ratifying Bolt's acts;
- b. Sheriff Thomas did not participate in, authorize or ratify Bolt's acts;
- c. Bolt was not an official whose acts and edicts may fairly be said to represent County policy;
- d. The jury found Respondent Williams was not damaged as a result of his Section 1983 claim.

What the case then becomes is a simple recovery of damages based solely on a pendent claim of assault and battery. The Fifth Circuit has noted that due to the limitations on liability that must be traced to an abuse of government power in order to raise an ordinary tort to the stature of a Constitutional violation,

[t]his . . . renders federal rights protection far less extensive than that afforded by the common law of battery and negligence.

Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980) cert. den. 451 U.S. 1019.

The fact that Deputy Bolt was employed at the Dallas County Jail at the time he committed what the jury found to be an assault and battery is not a sufficient nexus to attach liability to Dallas County. This Court has said:

. . . Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tort feisor or, in other words, a municipality cannot be held liable under Section 1983 on a *respondent superior* theory.

Monell v. Department of Social Services of the City of New York, supra, at page 691, emphasis in the original. This Court has held that in police misconduct cases, the pattern of police misconduct upon which liability and injunctive relief are grounded, was the adoption of and enforcement of deliberate policies in order to implicate the high officers and the municipalities. *Rizzo v. Goode*, 423 U.S. 362, 374 (1976). In this case no such policy or practice has been alleged or proved. See further, *Lenard v. Argento*, 699 F.2d 874, 885 (7th Cir. 1983), *Dunn v. State of Tennessee*, supra.

Furthermore, Respondent had a right to sue Bolt individually under the Civil Rights Act if he wanted. As a matter of fact, a suit against Bolt (and others) personally is more in keeping with the purposes of the Civil Rights Act than a suit against him in his official capacity. If an employee is allowed to violate the civil rights of another and then require the County to pay the Plaintiff's attorney fees under 42 U.S.C. § 1988 in a Section 1983 case seeking only damages or equitable relief, such a holding as the Court of Appeals made in this case would permit an employee to indiscriminately violate rights, knowing the County would pay the bill.

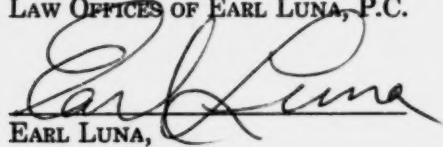
The Civil Rights Act of 1871 was not intended to encourage this type of action. County employees will be more reluctant to violate the principles of *Elrod vs. Burns*, 427 U.S. 347 (1976), when they face personal financial responsibility for such actions.

Therefore, the Court of Appeal's holding that Dallas County is responsible for the attorney fees assessed against Bolt by the trial Court is, under the circumstances of this case, in conflict with the tenets of *Monell*, and this Petition for a Writ of Certiorari should be granted, and the finding of liability for attorney fees against Dallas County in the case of *Williams v. Thomas*, 692 F.2d 1032 (5th Cir. 1982) should be reversed.

CONCLUSION

For those reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,
LAW OFFICES OF EARL LUNA, P.C.

A handwritten signature in dark ink, appearing to read "Earl Luna", is written over a horizontal line.

EARL LUNA,
Counsel of Record
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ATTORNEYS FOR PETITIONER

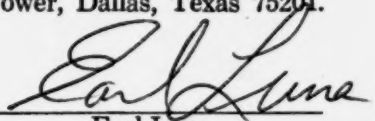
PROOF OF SERVICE

STATE OF TEXAS

COUNTY OF DALLAS }

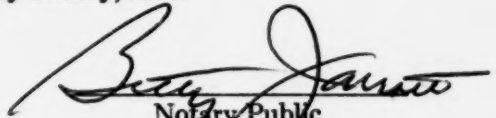
Before me, the undersigned Notary Public in and for Dallas County, Texas on this day personally appeared EARL LUNA, who being by my duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been retained as attorney of record for Petitioner Dallas County to file this petition for writ of certiorari.

I further state upon oath that upon the 2d day of May, 1983, I served copies of the foregoing Petition for Writ of Certiorari on the Respondents by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Ms. Sue LaGarde, Assistant District Attorney, Ninth Floor, County Courthouse, Dallas, Texas 75202, and Mr. Robert T. Mowrey and Mr. Mitch Bell, of Locke, Purnell, Boren, Laney and Neely, 3600 Republic National Bank Tower, Dallas, Texas 75201.



Earl Luna

SUBSCRIBED and SWORN To before me by the said Earl Luna, this the 2d day of May, 1983.



Notary Public
Dallas County, Texas

U.S. Court of Appeals
FILED
Feb. 4, 1983
Gilbert F. Ganuchau
Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1376

DONALD WILLIAMS

Plaintiff-Appellee
Cross-Appellant,

versus

CARL THOMAS, ET AL.,

Defendants,

JOSEPH BOLT,

Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(February 4, 1983)

Before RUBIN and JOHNSON, Circuit Judges, and Veron*,
District Judge:

PER CURIAM:

It Is ORDERED that the petition for rehearing filed in the
above entitled and numbered cause be and the same is hereby
DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Clerk's Note:
See Rule 41 Frap and Local
Rule 17 For Stay of the
Mandate

*District Judge of the
Western District of
Louisiana, sitting by
designation.

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**Donald WILLIAMS, Plaintiff-Appellee
Cross-Appellant,**

v.

Carl THOMAS, et al., Defendants,

**Joseph Bolt, Defendant-Appellant
Cross-Appellee.**

No. 81-1376.

**United States Court of Appeals,
Fifth Circuit.**

Dec. 6, 1982.

County jail inmate initiated federal civil rights action with state pendent claim for assault and battery against two sheriff's deputies seeking redress for injuries inflicted upon him while imprisoned in county jail. The United States District Court for the Northern District of Texas, Robert M. Hill, J., entered judgment on a jury verdict against one of deputies, awarding inmate \$500 in compensatory damages and \$2,500 in attorney fees. Deputy appealed and inmate cross-appealed, contending that District Court abused its discretion by making an insufficient award of attorney fees. The Court of Appeals, Johnson, Circuit Judge, held that: (1) deputy waived any complaint he had concerning District Court's charge as it related to good-faith defense in assault and battery action; (2) civil rights cause of action and state assault and battery action did not merge into one claim; thus, good faith finding with respect to civil rights claim did not bar recovery under assault and battery action; (3) inmate was entitled to attorney fees under civil rights attorney fees statute; and (4) award of \$2,500 as attorney fees was inadequate and an abuse of discretion.

Affirmed in part, reversed in part, and remanded.

1. Federal Courts — 626

Failure to object to trial court's failure to submit good-faith defense in relation to state pendent assault and battery claim as well as to federal civil rights claim waived any complaint on appeal. Fed.Rules Civ. Proc. Rule 51, 28 U.S.C.A.

2. Civil Rights — 13.14

Federal civil rights cause of action and state pendent assault and battery claim did not merge into one claim, and, hence, jury's finding, in judging federal civil rights claim, that sheriff's deputy acted in good faith in using excessive force against inmate did not bar recovery on state pendent law claim of assault and battery, for which jury made no such good-faith finding. 42 U.S.C.A. § 1983.

3. Civil Rights — 13.17

County jail inmate who prevailed on pendent state law claim of assault and battery was entitled to recover attorney fees since civil rights claim and pendent state law claim arose out of common nucleus of operative facts, even though inmate did not prevail on civil rights claim because jury found that sheriff's deputy who allegedly used excessive force on inmate acted in good-faith. 42 U.S.C.A. §§ 1983, 1988.

4. Civil Rights — 13.17

Where attorneys for prevailing party in civil rights action claimed to have expended 400 hours on case which involved significant pretrial preparation and a three-day jury trial, district court abused its discretion in awarding fees of \$2,500 in view of attorneys' success in vindicating party's established constitutional rights. 42 U.S.C.A. §§ 1983, 1988.

5. Civil Rights — 13.17

Award of attorney fees under civil rights attorney fees statute may lie against governmental unit even if it is not named as a party in litigation. 42 U.S.C.A. §§1983, 1988.

6. Civil Rights — 13.17

Where sheriff's deputy was responding to official directives of his superior at time incident in which deputy used excessive force against county jail inmate occurred and where deputy was a state actor for purposes of civil rights laws, award of attorney fees for inmate's attorneys would lie against county, even though county was not a party in litigation and inmate's complaint, which was filed pro se, did not allege that deputy was acting in an official capacity. 42 U.S.C.A. §§1983, 1988.

Sue L. Lagarde, Asst. Dist. Atty., Dallas, Tex., for defendant-appellant cross-appellee.

Locke, Purnell, Boren, Laney & Neely, Robert T. Mowrey (court-appointed), Dallas, Tex., for plaintiff-appellee cross-appellant.

Appeals from the United States District Court for the Northern District of Texas.

Before RUBIN and JOHNSON, Circuit Judges, and VERNON*, District Judge.

JOHNSON, Circuit Judge:

Donald Williams initiated this section 1983 action seeking redress for injuries inflicted upon him while imprisoned in the Dallas County Jail, Dallas, Texas. Williams maintained that deputies Joseph Bolt and Larry Smith¹ imposed cruel

*District Judge of the Western District of Louisiana, sitting by designation.

¹Williams also joined Sheriff Carl Thomas as a defendant in his original complaint. However, the district court dismissed Sheriff Thomas from the lawsuit and the district court's actions, in this regard, have not been complained of on appeal.

and unusual punishment upon him and deprived him of his liberty without due process of law by grabbing him and slamming him against the wall and the floor of the Dallas County Jail. In an amended complaint, Williams added a state assault and battery action pursuant to the district court's pendent jurisdiction and sought recovery of attorney's fees under 41 U.S.C. §1988. The case was tried before a jury, and, thereafter, the district court rendered judgment against deputy Bolt and awarded Williams \$500 in compensatory damages and \$2500 in attorneys' fees. Deputy Bolt raises thirteen issues on appeal and Williams has filed a cross-appeal contending that the district court abused its discretion by making an insufficient award of attorneys' fees. This Court affirms the district court's award of \$500 in compensatory damages, reverses the district court's inadequate award of attorneys' fees, remands this case for a determination of the proper amount of attorneys' fees due, and holds that the attorneys' fees award lies against the County.

I. The Factual Background and the Jury's Response to the Court's Charge

Donald Williams was an inmate in the Dallas County Jail on February 21, 1979. On that date, another male inmate in Williams' cell was caught by a female officer violating a jail rule, and, apparently, the inmate refused to cooperate with the officer. The supervisor of the third floor, Officer Riggins, was informed of the conflict and he requested that four male officers, including Deputy Bolt, and one female officer assist the investigating female officer in her attempt to curtail the inmate's violation of the jail rule. Since many of the male inmates had questioned the female officers' authority, Officer Riggins decided to send the two female officers into the cell in an attempt to establish their authority.

Williams claims to have been asleep during this potentially explosive situation. However, when the female officers entered the cell, Williams maintains that another inmate awakened him and told him that he had been requested to come out of the cell. As Williams came out of the cell, Officer Bolt, who

was waiting outside with the other male officers, recognized Williams as "the inmate other deputies and I had fought with several times previously." Williams testified that as he exited the cell, Deputy Bolt grabbed him and slammed him against the wall and the floor. Moreover, Williams testified that Deputy Bolt kicked and beat him after he fell to the floor. As a result of Deputy Bolt's actions, Williams received injuries of sufficient severity to cause a doctor to refer Williams to Parkland Hospital for examination. The Dallas County Jail's medical records indicate that Williams sustained "bruises" to his left side, left arm, and left wrist.

In an attempt to vindicate his constitutional rights, Williams initiated this section 1983 action *pro se*. After the district court appointed counsel to represent Williams, an amended complaint was filed joining a pendent assault and battery action under Texas common law. At the close of the evidence, the district judge submitted special issues to the jury on the section 1983 cause of action and the state assault and battery action. The jury's responses indicated that Deputy Bolt was the officer responsible for Williams' injuries. The pertinent special issues were answered in the following manner:

Section 1983 claim:

1. Deputy Bolt used excessive force against Williams.
2. Deputy Bolt acted in good faith.
3. Deputy Bolt's use of excessive force was a proximate cause of Williams' injuries.
4. Williams was entitled to no monetary compensation for Deputy Bolt's use of excessive force.

State assault and battery claim:

1. Deputy Bolt committed an assault and battery against Williams.
2. Deputy Bolt's assault and battery was a proximate cause of Williams' injuries.

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3. Deputy Bolt was not acting in self defense.
4. Williams was entitled to \$500 as compensation for Deputy Bolt's assault and battery.

After the jury returned its verdict, Williams moved for judgment in conformity with the verdict. However, Deputy Bolt opposed entry of judgment in Williams' favor and moved for judgment in his favor based on the jury's affirmative response to the good faith issue that was submitted with the section 1983 claim. The district judge, concluding that the good faith defense was inapplicable in this case as a matter of law, rendered judgment for Williams and awarded \$500 in compensatory damages pursuant to the jury's findings on the assault and battery claim. Moreover, deciding that Williams was a "prevailing party" under 42 U.S.C. § 1988, the district court awarded Williams \$2500 in attorneys' fees. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

II. *Good Faith and the State Assault and Battery Claim*

Deputy Bolt contends on appeal that the jury's finding of good faith bars recovery by Williams on the state assault and battery action. Initially, it should be noted that the good faith defense was submitted only in relation to the section 1983 cause of action. The district court judge prefaced his instructions to the jury by stating: "I will first instruct you as to the federal law claims and then instruct you as to the state law claims." Thereafter, the district court judge instructed the jury on excessive force and good faith. After concluding the portion of the charge relating to the federal claim, the trial judge stated: "I will now instruct you as to the laws of the State of Texas as they relate to Williams' state claim of assault and battery." However, in instructing the jury on the state claim, no mention was made as to a good faith defense and no issue was submitted in that regard. Therefore, it is clear that the jury was directed to consider the issue of good faith only as it applied to the section 1983 claim.

[1] Significantly, Deputy Bolt did not object to the trial court's failure to submit the good faith defense in relation to the assault and battery claim. Rule 51 of the Federal Rules of Civil Procedure specifically provides:

No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Consequently, Bolt has waived any complaint he has concerning the district court's charge as it relates to the good faith defense and the assault and battery action.

[2] In his final attempt to persuade this Court to apply the good faith defense to the state tort claim, Deputy Bolt contends that the section 1983 cause of action and the state assault and battery action merged into one claim, and, hence, the good faith finding bars recovery under both theories. Bolt's merger theory fails to recognize the fundamental distinction between state common law torts and federal constitutional torts. Although the Supreme Court has stated that section 1983 must be "... construed against a background of common law tort principles..." *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), the Court has refused to transform state common law tort liability into federal constitutional tort liability. As the Supreme Court stated in *Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979), "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." Heeding the Supreme Court's advice, this Court has held that proof that a government official acted in good faith will not enable the official to avoid liability under state common law principles. *Douthit v. Jones*, 619 F.2d 527 (5th Cir. 1980). Moreover, recognizing that "... federal rights protection [may be] far less extensive than that afforded by the common law..." this Court has refused

to deny recovery on a pendent state tort action simply because the plaintiff failed to prevail on the section 1983 action. *Williams v. Kelly*, 624 F.2d 695, 697 (5th Cir. 1980). Therefore, this Court holds that the federal and state claims did not merge, and, hence, the district court did not err in awarding the plaintiff \$500 in compensatory damages based upon the jury's response to the state assault and battery action.

III. *Good Faith and the Section 1983 Claim*

Deputy Bolt maintains that the district court erred in concluding that the good faith defense was inapplicable to the instant section 1983 action as a matter of law. However, as noted previously, the district judge entered judgment for Williams based upon the state assault and battery claim, rather than the section 1983 claim. Thus, even if the district court erred in refusing to apply the good faith defense to the section 1983 claim, and this Court expresses no opinion on this matter, Williams would still be entitled to recover under the state assault and battery action. As noted in Section II of this opinion, a jury finding of good faith under the section 1983 action would not bar Williams' recovery under the state cause of action. See *Douthit v. Jones*, 619 F.2d 527, 537 (5th Cir. 1980) ("Proof that the defendant sheriff acted in good faith, while relevant to the issue of whether the plaintiff can recover punitive damages, will not enable him to avoid liability under Texas common law for the unlawful imprisonment of an individual."); *Hull v. City of Duncanville*, 678 F.2d 582, 585 (5th Cir. 1982) ("The municipal actions so pleaded may constitute a [common law] tort, but they do not constitute a constitutional tort that justifies a 1983 action."). Thus, since this Court has affirmed Williams' recovery of compensatory damages under the state assault and battery action, it is unnecessary for this Court to decide whether the district court erred in refusing to apply the good faith defense to the section 1983 claim. Moreover, in light of the Supreme Court's holding in *Harlow v. Fitzgerald*, —U.S.—, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1980),

it is apparent that the good faith defense, as defined to the jury in this case, was improperly submitted.²

IV. Attorneys' Fees

A. Is Williams a Prevailing Party?

[3] Deputy Bolt argues that the district court erred in concluding that Williams was entitled to attorneys' fees under 42 U.S.C. § 1988. In *Knight v. Watkins*, 616 F.2d 795, 798 (5th Cir. 1980), this Court made the following observation:

The enactment of section 1983 demonstrates solicitude for the individual and concern for his protection against the abuse of his constitutional rights by the state and its officialdom. The Civil Rights Attorney's Fees Awards Act makes the remedy meaningful. It requires the court to award fees to the prevailing party "unless special circumstances would render such an award unjust."

Noting that the courts "have taken an extremely liberal view on nearly every interpretative question that has arisen thus far under 1988 . . .," *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir. 1980), this Court holds that Williams is entitled to recover attorneys' fees.

Bolt argues that Williams is not a "prevailing party" since the jury concluded that Deputy Bolt acted in good faith. However, as noted in Section II and III of this opinion, the good faith defense was submitted only in relation to the section 1983 claim. Once again, it is significant that the district court rendered judgment for Williams based upon his successful state pendent tort action. In *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 2576 n. 15, 65 L.Ed.2d 653 (1980), the Supreme Court intimated that a party prevailing on a substantial claim that is pendent to a civil rights claim is entitled to a recovery of attorney's fees when the civil rights

²This Court notes, however, that the district court judge did not have the illumination on the good faith issue provided by *Harlow* when he submitted the charge to the jury.

claim and the pendent claim arise out of a common nucleus of operative facts. This Circuit, along with other circuits, has followed the Supreme Court's direction. *See, e.g., Gibbs v. Town of Frisco City, Alabama*, 626 F.2d 1218 (5th Cir. 1980); *Lund v. Affleck*, 587 F.2d 75, 76-77 (1st Cir. 1978); *Seals v. Quarterly County Court*, 562 F.2d 390, 393-94 (6th Cir. 1977); *Bond v. Stanton*, 555 F.2d 172, 174 (7th Cir. 1977), *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978); and *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423, 426 (8th Cir. 1978).

These cases demonstrate that the federal courts are aware of the fact that often a court will affirm a judgment on a pendent, noncivil rights claim when to do so will allow it to avoid an unnecessary decision on a difficult constitutional issue. For example, in this case, this Court has refused to decide whether the good faith defense was improperly rejected by the district court since Williams would recover compensatory damages under the pendent claim, regardless of this Court's decision on the good faith issue. Moreover, by allowing a recovery of attorneys' fees "the congressional goal of encouraging suits to vindicate constitutional rights [is furthered] without undermining the well-settled judicial policy of avoiding unnecessary decisions [on] important constitutional issues." *Maier*, 100 S.Ct. at 2577.

B. Amount of Attorneys' Fees Due

By way of cross-appeal, Williams maintains that the district court abused its discretion by making an inadequate award of attorneys' fees. At the outset, it should be noted that the district court recognized the need for the guiding hand of counsel and appointed an attorney to represent Williams under 28 U.S.C. § 1915(d). *See* District Court's Orders Appointing Counsel, Aug. 29 and Oct. 30, 1979.

After concluding that Williams was a "prevailing party" under section 1988, the district court embarked upon a determination of the amount of attorneys' fees due. The evidence presented to the district judge by Williams' attor-

neys indicated that they had devoted 400 hours to Williams' case. Additionally, the district court noted that the customary hourly rate for attorneys of equal experience ranged from \$50 to \$60 per hour, and that customary fees in this area ranged from \$3000 to \$5000. However, the district court concluded that the 400 hours devoted to Williams' case was excessive, and, hence, Williams' attorneys were awarded only \$2500 as attorneys' fees. Surprisingly, the district judge made the following statement in his opinion: "The court is aware that such fee award fails to fully compensate Williams' counsel for their time, but would hope that the experience gained would prove beneficial."

In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), this Court listed the following factors as the relevant considerations to be used by a district court in awarding attorney's fees:

(1) The time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform legal service properly, (4) the preclusion of other employment by the attorney due acceptance of the case, (5) the customary fee [for similar work in the community], (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Although each of the *Johnson* factors is significant, recent decisions by this Court indicate that four of the factors are of special importance: (a) the time and labor involved, (b) the customary fee, (c) the amount involved and the results obtained, and (d) the experience, reputation, and ability of counsel. See *Mitchell v. Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d 1274, 1281 n. 10 (5th Cir.1978); *Rainey v. Jackson State College*, 551 F.2d 672, 677 (5th Cir.1977).

1. *The Time and Labor Involved and the Customary Fee*

As noted previously, the district court concluded that the 400 hours expended by Williams' attorneys in vindicating his rights were excessive. The record clearly demonstrates that significant pretrial preparation was conducted by Williams' attorneys. Williams' attorneys filed two sets of interrogatories and two motions to produce, took six depositions of potential witnesses, sent letters and questionnaires to six potential eyewitnesses incarcerated in the Texas Department of Corrections, interviewed three inmates in the Dallas County Jail, and reviewed several documents produced by Deputy Bolt and other deponents. Additionally, the hours of time spent by Williams' attorney in preparing this case included the necessary and reasonable hours required to draft the aforementioned documents, attend hearings on discovery matters, research the law in this burgeoning area of the law, review depositions, prepare questions for witnesses, and devise trial strategy.³ No serious contention can be made that these activities are not necessary to adequately prepare for a jury trial — in this case, a jury trial that lasted three days.

[4] Even if it be considered that Williams' attorneys spent an immoderate amount of time on some of these matters,⁴ the record demonstrates that the district court limited the attorneys' fees award in a dramatic fashion. An attorney produced as an expert witness on civil rights cases testified that "something in the magnitude of 220 hours would have been about right." However, even if this Court assumes a \$50 hourly rate — the least amount recognized by the district judge as a reasonable and customary

³It is noted that the district court judge was presented with detailed records of the time spent by Williams' counsel and he matters upon which the time was spent. See Record, vol. 1, at 36-A and exhibits attached thereto.

⁴It is noted that the 400 hours claimed by Williams' counsel was time actually expended. Williams' counsel kept track of their time in a prudent manner and presented the district court with detailed time records. Record, vol. 1, at 36-A and exhibits attached thereto.

fee — the \$2500 attorneys' fee award would reflect an expenditure of only fifty hours. The preparation undertaken in this case and the performance of a three day jury trial would appear to require much more than fifty hours. Although such an award would not alone lead this Court to reverse the district court's award of attorneys' fees, when taken in connection with the factors discussed below, it is apparent that the district court abused its discretion by making the instant award.

2. *The amount and the Results Obtained and the Experience, Reputation, and Ability of the Attorneys*

As noted previously, the small award of attorneys' fees could be appropriate if other circumstances supported the district court's limiting of the amount obtained by multiplying the customary hourly rate by the reasonable time actually expended by Williams' attorneys. However, although Williams' monetary recovery was relatively small, it is clear that the attorneys succeeded in vindicating Williams' established constitutional rights. The jury's response to Special Issue 1 clearly indicates that Williams' constitutional protections were infringed. Additionally, it is difficult to place a monetary amount upon the benefit that the public receives when public officials are reminded that acts of unwarranted violence will not go unnoticed in the American system of justice. The results in this case, obtained as a result of the attorneys' efforts, do not appear to be as characterized by the district court, which placed undue emphasis on the modest money damages that were found by the jury. As perceived correctly, Williams' counsel not only prevailed in the instant case, but succeeded in vindicating the established, important constitutional rights guaranteed to all citizens. Such a result furthers the policies behind section 1983 and provides incentive for other victims of improper governmental conduct to seek redress pursuant to constitutional authority. The policies behind section 1988 are comprised when a district court places undue emphasis upon the amount of the monetary recovery in arriving at its attorney's fees award. See *Basiardanes v.*

City of Galveston, 682 F.2d 1203 at 1220 (5th Cir.1982) (“... an attorney’s fees award may be supported by nominal damages since the successful claim serves to vindicate constitutional rights.”).

According to *Johnson*, an award of attorney’s fees can be limited according to the experience,⁵ reputation, and ability of the attorneys. However, as the Court noted in *Johnson*, “If a young attorney demonstrates skill and ability, he should not be penalized for recently being admitted to the bar.” *Johnson*, 488 F.2d at 719. In the instant case, the district judge noted that Williams’ attorneys “... handled the case in a very competent manner” Furthermore, the district court closed its opinion with the following statement: “The prosecution of this action by Williams’ counsel who volunteered their services with little hope of remuneration represented selfless advocacy in the best tradition of the bar, which fact the court here wishes to publicly acknowledge.”

The record before this Court bears no witness to the fact that Williams’ counsel volunteered their services. What the record does bear witness to is the fact that Williams’ counsel was appointed by the district court judge — and that the attorneys responded fully to their obligation. Further, this Court perceives absolutely no possible indication that appointed counsel entered upon their duties “with little hope of remuneration.” What does appear clearly from the record before the Court is that appointed counsel undertook the responsibility of the court’s appointment in the highest traditions of the bar and provided quality professional services to their client. The record demonstrates that Williams’ attorneys actively and vigorously litigated this matter in every apparent anticipation of a recovery,

⁵The record demonstrates that one of Williams’ appointed counsel graduated from law school in 1977. As Williams’ counsel conceded in their presentation of their experience, they are not seasoned trial lawyers. However, the hourly rates claimed reflected their lack of substantial experience.

which did, in fact, occur. Hence, having vindicated Williams' rights, the attorneys are entitled to reasonable recompense for their services. The articulated appreciation of the district judge is no substitute for the ends sought in section 1988.

This Court must hold that the district court abused its discretion in awarding the attorneys' fees reflected in the district court's judgment. Section 1988 was enacted in a clear, commendable attempt to encourage the initiation of civil rights actions that would not have been undertaken by most attorneys, due to the fact that a large monetary recovery is generally unlikely. Thus, when members of the bar, designated by the court as attorneys for *pro se* applicants, undertake their responsibilities vigorously, set aside their more remunerative practices, and champion the rights of the indigent in an effective, selfless, and self-sacrificing manner, the district court should not impede the policies behind section 1988 by making an inadequate award of attorney's fees. In other words, when attorneys respond to the directives of the district court and prevail by vindicating the *pro se* applicant's rights, the district court abuses its discretion by making an award that discourages attorneys from, or even penalizes them for, representing the *pro se* applicant.

Finally, it should be noted that the district court concluded that the attorneys' fees should be paid by Deputy Bolt in his individual capacity. Thereafter, noting that the hardship imposed upon Bolt was a relevant factor in awarding attorneys' fees, the district court stated that it had considered Bolt's inability to pay a large award of attorneys' fees in reaching its award. Since this Court concludes in the following discussion, that the award of attorneys' fees should be paid by the County, this Court must conclude that the district court erred in considering Deputy Bolt's inability to pay a substantial award of attorneys' fees in setting its award. Hence, this Court holds that the district court abused its discretion in awarding an inadequate amount of attorneys' fees and remands this case for a

proper award of attorneys' fees,⁶ which should include the reasonable and necessary costs incurred in this appeal.

C. *Liability for Attorneys' Fees*

In his final ground of error, Deputy Bolt contends that the district court erred in awarding attorneys' fees against Bolt in his individual capacity. The district court concluded that the award of attorneys' fees should be paid by Bolt in his individual capacity since the County was not named as a party and since Bolt was, in the district court's view, sued only in his individual capacity.

[5] Section 1988 permits a district court to award attorney's fees against a county when a plaintiff prevails in a suit brought pursuant to section 1983. The eleventh amendment is no longer a bar to an award of attorney's fees against a state governmental unit. *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). Moreover, it appears to be well-settled law that an award may lie against the governmental unit even if it is not named as a party in the litigation.⁷ See *Hutto v. Finney*, 437 U.S. at 694, 98 S. Ct. at

⁶In determining the amount of attorneys' fees due upon remand, the district court should engage in a basic three-part analysis: (1) the district court should determine the reasonable amount of hours actually expended by counsel; (2) the district court should determine the customary fee received for similar services in the community; and (3) only after multiplying the reasonable time spent by the customary fee should the district court, if it chooses to do so, discount the award pursuant to the other *Johnson* factors. See *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980).

⁷Even though the County was not named as a party, it should be noted that Deputy Bolt was represented by the Dallas District Attorney's office pursuant to Tex.Rev.Civ.Stat. Ann. art. 332c §2, which provided:

In any suit instituted by a non-political entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney or both, shall, subject to the provisions contained in Section 3, represent the official or employee of the county if the suit involves any act of the official or employee while in the performance of public duties.

Tex.Rev.Civ.Stat. Ann. art. 332c § 2 (Vernon Supp.1982) (emphasis added).

2575; *Barrett v. Thomas*, 649 F.2d 1193, 1201-02 (5th Cir. 1981); *Universal Amusement Co. v. Hofheinz*, 616 F.2d 202, 204 (5th Cir. 1980); *McNamara v. Moody*, 606 F.2d 621, 626 (5th Cir. 1979), *cert. denied*, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980); *Morrow v. Dillard*, 580 F.2d 1284, 1299 n. 18 (5th Cir. 1978); and *Miller v. Carson*, 563 F.2d 741, 755 (5th Cir. 1977).

In the instant case, Williams initiated his action against Deputy Bolt under section 1983. However, Bolt contends, and the district court concluded, that he was sued only in his individual capacity. This Court disagrees. Williams initiated his initial complaint alleging that Deputy Bolt, as a state actor and an employee of the Dallas County Jail, deprived him of his constitutional rights while engaged in the furtherance of his duties. Additionally, it is clear that Deputy Bolt was on duty and responding to the orders of his superior, Officer Riggins, when he encountered Williams. This is not a case in which the tort did not arise out of the government employee's performance of his duties. Although Deputy Bolt arguably may have exceeded his authority by using excessive force, it has long been settled that he was still acting in an official capacity. See *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[6] It is significant that Williams' original complaint was filed *pro se*. Even though Williams may not have used the words "in his official capacity,"⁸ it is apparent from the nature of his complaint that Williams was complaining of Deputy Bolt's actions that occurred while he was acting as an officer for the County. Certainly, this Court should not deny attorneys' fees against the governmental entity just

⁸As was noted in note 1, Williams' original complaint named Sheriff Carl Thomas as a defendant. It is clear from a review of the caption in Williams' original complaint that Sheriff Thomas was sued in his "afficial [sic] capacity." Moreover, the markings underneath Sheriff Thomas' name could be construed as ditto marks indicating that Bolt was also sued in his official capacity. Even if this is not the proper interpretation of these marks, this Court would still conclude that Bolt was sued in his official capacity for the reasons stated in the text.

because a *pro se* plaintiff failed to use the "magic" words "in his official capacity." See *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 652 (1972). Moreover, the district court, in charging the jury, instructed them that Deputy Bolt was a state actor for purposes of section 1983. Therefore, since Deputy Bolt was responding to the official directives of his superior at the time this incident occurred and since Deputy Bolt was a state actor for purposes of section 1983, this Court concludes that the award of attorneys' fees should lie against the County.

This holding is supported by the legislative history of section 1988. For example, the Report of the Senate Committee on the Judiciary on the Civil Rights Attorney's Fees Awards Act, then Senate Bill 2278, stated:

. . . As with cases brought under 20 U.S.C. §1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, *in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)*.

(footnotes omitted) (emphasis added). S.Rep. No. 1101, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913.

Finally, this Court emphasizes that an award of attorney's fees against the governmental entity is not proper in every case in which one of its employees commits a tort. Section 1988 was not intended to encompass a case in which a tort judgment is obtained against a government employee who was not in the furtherance of his duties at the time that the incident occurred that gave rise to the judgment. To the contrary, section 1988 will allow a recovery of attorney's fees only when a plaintiff is properly classified as a "prevailing party" under section 1988.

The instant case, however, is not one in which a plaintiff sued an individual under a purely state cause of action. Not only did Williams prevail on a substantial claim brought pendent to his section 1983 action, but Williams received an affirmative finding from the jury demonstrating that Deputy Bolt violated his constitutional rights. As this Court has already noted, a plaintiff falls within the ambits of section 1988 when he prevails on a substantial pendent claim arising out of the same common nucleus of operative facts that gave rise to the section 1983 claim. Moreover, a plaintiff is entitled to attorney's fees under section 1988 if he secures an affirmative finding that demonstrates that his constitutional rights were violated, even though a finding of good faith is also returned by the jury. See Section IV (A) of this opinion and cases cited therein.

V. Conclusion

This Court AFFIRMS the district court's award of \$500 in compensatory damages, REVERSES the district court's inadequate award of attorneys' fees, REMANDS this case for a determination of the proper amount of attorneys' fees due, and holds that the attorneys' fees award lies against the County.

U.S. District Court
Northern District of Texas
FILED
Apr. 3, 1981
Joseph McElroy, Jr., Clerk
By R. Edmeston
Deputy

**In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

DONALD WILLIAMS,

Plaintiff

v.

SHERIFF CARL THOMAS, ET AL,

Defendants

Civil Action No. CA-3-79-0385-D.

J U D G M E N T

This action came on for trial before the Court and a jury, Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, and the Court having filed its Memorandum Opinion and Order regarding attorney's fees,

It is ORDERED and ADJUDGED that:

- (1) plaintiff Donald Williams recover of the defendant Joseph E. Bolt:
 - (a) the sum of \$500, with interest at the legal rate;
 - (b) the sum of \$2500 for the use and benefit of his attorney, with interest at the legal rate; and,
 - (c) his costs of action.
- (2) plaintiff take nothing from the defendants Sheriff Carl Thomas and Larry Smith, that the action against these defendants be dismissed on the merits, and that the defendants Sheriff Carl Thomas and Larry Smith recover of the plaintiff Donald Williams their costs of action.

Dated at Dallas, Texas, on this 2nd day of April, 1981.

United States District Judge

B-2

DONALD WILLIAMS,

Plaintiff

v.

SHERIFF CARL THOMAS et al,

Defendants.

Civ. A. No. CA-3-79-0385-D

United States District Court,
N. D. Texas,
Dallas Division.

April 3, 1981.

Jail inmate brought assault and battery claim and claim under statute providing civil action for deprivation of rights against deputy sheriff and sheriff of county, alleging use of excessive force. The District Court, Robert M. Hill, J., held that: (1) where jail inmate presented no evidence at trial that sheriff participated in, authorized, or ratified the assault and battery, or that he was negligent in his administration of county jail or in his hiring and supervision of deputies, dismissal of claim against sheriff was appropriate and sheriff could not be held liable under theory that a sheriff is absolutely responsible for all acts of his deputies; (2) where jail inmate alleged, and jury apparently found, that deputy sheriff grabbed inmate, slammed him against a wall, threw him to the floor and kicked and beat him, all such being in excess of force necessary under the circumstances, such behavior clearly violated inmate's constitutional right to be free from such unjustified assault, and thus no "good faith" defense was applicable; and (3) where jail inmate succeeded in establishing a constitutional violation, he was a prevailing party and was entitled to award of attorney fees, even though jury found that violation caused no damages.

Ordered accordingly.

B-3

1. Sheriffs and Constables — 100

Given a deputy performing an unlawful act, the focus shifts from the capacity in which the deputy acted to the culpability of the sheriff in authorizing, participating in or ratifying the unlawful acts of the deputy; though "authorization," "participation" and "ratification" are fairly elastic terms, they focus in on a relevant issue, that is, the behavior of the sheriff himself, without precluding assessing liability against the sheriff for what, by not investigating, he may have ratified.

2. Sheriffs and Constables — 100

Where jail inmate presented no evidence at trial that sheriff participated in, authorized, or ratified assault and battery, or that he was negligent in his administration of the county jail or in his hiring or supervision of deputies, defendant's assault and battery claim and claim under statute providing civil action for deprivation of rights were properly dismissed and sheriff could not be held liable on a theory that sheriff was absolutely responsible for all acts of his deputies, including assault and battery committed by deputy against jail inmate. 42 U.S.C.A. §1983.

3. Officers and Public Employees — 114

Good faith is not wholly irrelevant to official immunity, but it comes into play when a public officer has made an erroneous decision as to the scope of his authority; it is a defense to a claim for damages arising out of an excusable cognitive jurisdictional mistake.

4. Prisons — 9

Statute stating that a guard employed by penal institution is justified in using any force, including deadly force, that he believes to be immediately necessary to prevent the escape of a prisoner from a jail endorses general notion of official immunity as an incident of official authority, and it cannot be doubted that the privilege to prevent escape implies the privilege to maintain discipline among inmates

in custody; however, bounds of such privilege are two-fold, that is, that actor must be a guard at a penal institution acting with a view to preventing an escape and he must believe his use of force to be immediately necessary. V.T.C.A., Penal Code § 9.52.

5. Prisons — 9

A guard's commission of acts unquestionably beyond the scope of his official duty as, for instance, the use of excessive force, would nullify his justification despite his good-faith belief in their immediate necessity; both elements must be present for a public official to prevail on a defense of justification.

6. Sheriffs and Constables — 99

Objective prong of good-faith defense to commission of acts beyond scope of deputy sheriff's official duties should be essentially a legal determination based not on the existence of any objective basis for given belief in the lawfulness of a course of conduct but, rather, based upon the reasonableness of an act given the state of the law as it existed at that time.

7. Sheriffs and Constables — 105

Where jail inmate alleged, and jury apparently found, that deputy sheriff grabbed inmate, slammed him against a wall, threw him to floor, and kicked and beat him, all such being in excess of force necessary under the circumstances, such behavior clearly violated prisoner's constitutional right to be free from such unjustified assault, and thus "good faith" defense was inapplicable in assault and battery claim and in claim under statute providing civil action for deprivation of rights. 42 U.S. C.A. §1983.

8. Civil Rights — 13.17

Where jail inmate established a constitutional violation in his claim under statute providing for civil action for deprivation of rights, he was a prevailing party for purposes of

statute stating that in any action or proceedings to enforce a provision of Civil Rights Act the court, in its discretion, may allow the prevailing party a reasonable attorney fee as part of the costs, and he was entitled to an award of attorney fees, even though jury found that jail inmate suffered no money damages as a result of violation. 42 U.S.C.A. §§1983, 1988.

9. Civil Rights — 13.17

Jail inmate's compensation award for state assault and battery claim could not, standing alone, provide basis for attorney fee under statute stating that in any action or proceeding to enforce a provision of Civil Rights Act the court, in its discretion, may allow the prevailing party reasonable attorney fees as part of the costs. 42 U.S.C.A. § 1988.

10. Civil Rights — 13.17

Court properly did not preclude consideration of jail inmate's constitutional claims and make consideration of them in any way contingent on the outcome of jail inmate's state assault and battery claims, in that there was no necessary congruity between federal constitutional claims and state tort claims, and thus court could not infer from simple recovery on assault and battery claim that jail inmate "prevailed" on his civil rights claim, a prerequisite to recovery of attorney fees under statute stating that in any action or proceeding to enforce a provision of Civil Rights Act the court, in its discretion, may allow the prevailing party a reasonable attorney fee as part of the costs. 42 U.S.C.A. § 1988.

11. Civil Rights — 13.17

Should jail inmate's uncompensated vindication on constitutional claim prove somehow insufficient in itself to justify his designation as a prevailing party, jury's finding as to the assault and battery, though itself alone insufficient to justify an award, taken in conjunction with jury

finding of a constitutional violation arising out of precisely the same incident, supported conclusion that jail inmate, by and large, prevailed on his civil rights claim and was entitled to attorney fees under statute stating that in any action or proceeding to enforce a provision of Civil Rights Act the court, in its discretion, may allow the prevailing party reasonable attorney fees as part of the costs. 42 U.S.C.A. §§ 1983, 1988.

12. Civil Rights — 13.17
Sheriffs and Constables — 143

Despite contentions of jail inmate that attorney fees be assessed against county sheriff's department or county, assessment of fees must be against deputy sheriff himself, who was sued by jail inmate on claim under statute providing civil action for deprivation of rights and on assault and battery claim, not in his official capacity, but individually.

13. Sheriffs and Constables — 143

Although the ability of a plaintiff to pay his attorneys in cases where a jail inmate is alleging use of excessive force by sheriff is largely irrelevant, the hardship imposed on the losing defendant is a factor which court may take into account.

14. Civil Rights — 13.17
Sheriffs and Constables — 143

Where customary hourly rates for attorneys with experience equal to jail inmate's counsel range from \$50 to \$60, it was understood from the beginning that, should jail inmate lose his case, his counsel would take nothing, some 400 hours devoted by jail inmate's counsel to action were excessive, and there was no evidence introduced during hearing on attorney fees going to the ability of deputy sheriff to pay such fees or deputy sheriff's coverage by any insurance or other contractual indemnification arrangement, but court could infer that deputy sheriff was prob-

ably an individual of modest means who could ill afford to pay full attorney fees that action might justify, \$2,500 was a reasonable attorney fee to be assessed against deputy sheriff on jail inmate's claim under statute providing civil action for deprivation of rights and assault and battery claim. 42 U.S.C.A. § 1983.

Robert H. Mowrey, Dallas, Tex., for plaintiff.

Sue Legard, Asst. Dist. Atty., Dallas, Tex., for defendants.

MEMORANDUM OPINION AND ORDER

ROBERT M. HILL, District Judge.

This action was brought pursuant to 42 U.S.C. § 1983. It arises out of events occurring while Donald Williams (Williams), plaintiff, was an inmate at the Dallas County, Texas, jail. The complaint charged that on the morning of February 21, 1979, Williams was assaulted by Joseph E. Bolt (Bolt), defendant, a Dallas County sheriff's deputy, without reason or justification, and that the injuries inflicted were so severe that Williams required hospital treatment. The complaint additionally charged that a second sheriff's deputy, Larry Smith (Smith), defendant, participated in the assault, and Carl Thomas (Thomas), the sheriff of Dallas County, was also named as a defendant. Williams alleged the action of these parties transgressed upon rights guaranteed him under the Eighth and Fourteenth Amendments to the United States Constitution to be free of cruel and unusual punishment and not to be deprived of liberty without due process of law. He also asserted a state assault and battery claim under pendent jurisdiction. In addition, Williams sought attorneys fees pursuant to 42 U.S.C. § 1988.

This action was tried before a jury, and after the court dismissed the action as to defendant Thomas, the jury returned a verdict in the form of special interrogatories pursuant to Rule 49(a), Fed.R.Civ.P. The jury found as follows:

Section 1983 Claim

1. (a) Bolt used excessive force against Williams.
(b) Smith did not use excessive force against Williams.
2. Bolt acted in reasonable good faith.
3. Bolt's use of unreasonable force was a proximate cause of Williams' injuries.
4. Williams was entitled to no monetary compensation for Bolt's use of unreasonable force against him.
5. In using unreasonable force Bolt acted without malice.
6. Based on its finding that Bolt acted without malice, the jury was not required to make a finding as to punitive damages.

Assault and Battery Claim

7. (a) Bolt committed an assault and battery against Williams, and such assault and battery was a proximate cause of Williams' injuries, though inflicted without malice.
(b) Smith did not commit assault and battery against Williams.
8. In committing an assault and battery against Williams, Bolt was not acting in self-defense.
9. Williams was entitled to Five Hundred Dollars (\$500) as compensation for Bolt's assault and battery against him.
10. Based on its finding that Bolt acted without malice, the jury was not required to make a finding as to punitive damages.

Thereafter Williams filed a motion for judgment. The Court has considered the motion, the briefs of the parties

and has heard oral argument and has taken evidence on the issue of attorney's fees. The Court is of the opinion that judgment should be entered in favor of Williams against Bolt in the amount of Five Hundred Dollars (\$500), for attorney's fees in the amount of Two Thousand Five Hundred Dollars (\$2500) and for costs of action.

Liability of Sheriff Carl Thomas

Counsel for Williams, in a letter dated February 13, 1981, has suggested that certain Texas statutory provisions make Thomas absolutely accountable for the acts of his deputies, and that the Court erred in peremptorily rendering judgment in favor of Thomas. Consequently, the Court feels it is proper to briefly address this contention.

Texas laws provides:

(a) Each sheriff is the keeper of the jail of his county. He shall safely keep therein all prisoners committed thereto by lawful authority, subject to the order of the proper court, and shall be responsible for the safe keeping of such prisoners.

(b) The sheriff may appoint a jailer to take charge of the jail, and supply the wants of those therein confined; but in all cases the sheriff shall exercise supervision and control over the jail.

Tex.Rev.Civ.Stat.Ann. art. 5116.

Sheriffs shall be responsible for the official acts of their deputies, and they shall have power to acquire from their deputies bond and security; and they shall have the same remedies against their deputies and sureties as any person can have against a sheriff and his sureties.

Tex.Rev.Civ.Stat.Ann. art. 6870. Despite the language of absolute liability present in these statutes, Texas courts, at least during the last forty years, have tended to apply a negligence or personal participation standard to sheriffs for

injury to prisoners in their custody. An early example is *Browning v. Graves*, 152 S.W.2d 515 (Tex.Civ.App. — Ft. Worth 1941, writ ref'd), a case involving the beating death of a prisoner arrested for public drunkenness who had been locked up with a group of considerably more vicious prisoners. The court in *Browning* approved the imposition of liability on the sheriff (who was not the jailkeeper) on the basis of the sheriff's negligence in failing to discover and remove the blackjacks used by the prisoners to commit the murder. The case is less concerned with expounding general principles than passing on the specific issues presented to the jury, but implicit within the approval of the negligence issues therein given is a rejection of absolute liability, at least in the context of this kind of harm.

In *Workman v. Freeman*, 155 Tex. 474, 289 S.W.2d 910 (1956), the Texas Supreme Court held that a defendant-sheriff was not liable for the wrongful arrest, mistreatment, and false imprisonment of the plaintiff by the sheriff's deputy so long as the sheriff neither directed nor ratified the wrongful acts of his deputy. The majority opinion in *Workman* relied heavily on the notion that the wrongful acts of the deputies were not "official" acts as specified by the sheriff's liability statute, citing *Maddox v. Hudgeons*, 31 Tex.Civ.App. 291, 72 S.W. 414 (1903, writ ref'd), which contained the following discussion:

[S]heriffs are made responsible [by statute] for the "official" acts of their deputies, and are given the same remedies against such deputies and their sureties as any person can have against the sheriff and his sureties. In the use of the term "official" in this statute, when construed with its connected clause, the Legislature must be presumed to have had knowledge of the well-defined distinction between official acts and acts done *colore officii*—a distinction upon which many of the apparently conflicting cases may perhaps be reconciled—and to have therefore intended to exclude responsibility for mere usurpation of authority on the part of their deputies.

72 S.W. at 415. The dissent in *Workman* accepted the notion that the sheriff's liability is determined by whether the acts of the deputies are in the course of official duty, but argued that the acts of the deputies, though unlawful, were undertaken within the scope of their official capacity as deputies and should therefore be imputed to the sheriff. Though the dissent did not cite the case, its opinion follows a line of cases back to *King v. Brown*, 100 Tex. 109, 94 S.W. 328 (1906), which held:

The character of the act, whether official or not, does not depend upon its lawfulness, but upon the fact that the person who performs it is in fact an officer and purports to act in his official capacity and does act by virtue of authority conferred by law.

94 S.W. at 330. *King* recognizes that to equate "unlawful" with "unofficial" is to effectively negate the sheriff's responsibility, since "if the act be lawful and lawfully performed . . . no damage could result from such an act." *Id.* Nevertheless, the majority in *Workman*, with a cursory nod toward *King*, rejected the imposition of liability absent some direction or ratification by the sheriff, so that absolute liability for official acts shades into a sort of administrative or participatory negligence test.

[1] That this is so is affirmed by *Rhoden v. Booth*, 344 S.W.2d 481 (Tex.Civ.App.—Dallas 1961, writ ref'd n. r. e.), which, in purportedly following *Workman*, ceases struggling with the distinction between official and unofficial acts, holding instead:

The general rule is that a sheriff or constable is not liable for the unauthorized acts of his deputies where the liability arises in tort unless the sheriff or constable authorizes, participates in, or ratifies the individual tortious acts of his deputies.

344 S.W.2d at 488. Given a deputy performing an unlawful act, the focus thus shifts from the capacity in which the

deputy acted to the culpability of the sheriff in authorizing, participating, or ratifying the unlawful acts of the deputy. This shift in emphasis appears to have resulted from the inability of courts to define "official acts" so as to meaningfully identify those cases in which fairness required an easing of the absolute liability seemingly demanded by the relevant statutes. Though "authorization," "participation" and "ratification" are fairly elastic terms, they focus in on a relevant issue, that is, the behavior of the sheriff himself, without precluding assessing liability against the sheriff for what, by not investigating, he may have ratified. Thus, the line drawn is more precisely discerned, though perhaps less in step with the letter of the statute.

In evaluating Texas tort claims the federal courts have followed the Texas courts in focusing on the behavior of the sheriff rather than the official capacity of the deputy in those cases involving the liability of a sheriff for the acts of a deputy. In *Miller v. Jones*, 534 F.2d 1178 (5th Cir. 1978), the Court held:

In order for the Sheriff to be liable under Texas law, he must know or have reason to believe that injury will likely be inflicted or he must have reason to anticipate the danger thereof and thereafter be negligent in failing to take steps to prevent the injury.

534 F.2d at 1180. Even in false imprisonment cases, in which for all practical purposes the sheriff's liability is strict, the touchstone of the sheriff's liability is his diligence in performing his duties. The following discussion is found in *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969):¹

In an opinion approved by the Texas Supreme Court, the Commission of Appeals ruled [in *McBeath, v. Campbell*, 12 S.W.2d 118 (Tex.Com.App.1929)] that while

¹Though overruled in *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976) (en banc), cert. denied, 429 U.S. 865, 97 S.Ct. 174, 50 L.Ed.2d 145 (1976), vis a vis § 1983 claims for wrongful detention, the observations in *Whirl* concerning the law of Texas remain valid.

the sheriff was not liable for the false arrest initiated by his deputy, he was liable in false imprisonment for failing to know the authority upon which his prisoner was held in the county jail:

"Certainly when the sheriff finds out that a prisoner is confined to his jail, which the law makes him the keeper of, and holds him responsible for, it is his duty to know by what authority he is confined therein, and he cannot close his eyes and fail to make an investigation and excuse himself on the ground of lack of knowledge . . ." [cite omitted].

407 F.2d at 794. Though the effect of the rule is to hold the sheriff strictly liable in Texas false imprisonment cases, the rationale for the rule rests on a sort of *per se* rule that the presence of one falsely imprisoned is so manifest and incapable of being over-looked that no sheriff could be unaware of such unlawful imprisonment in the absence of some considerable carelessness or other lack of diligence.

It should not go unnoticed that the general rule enunciated in *Rhoden* and *Miller* is limited to the sheriff's liability for torts committed by his deputies. Counsel for Williams has directed the Court's attention to *Rich v. Graybar Electric Co.*, 125 Tex. 470, 84 S.W.2d 708 (1935, opinion adopted), in which a constable's sureties were held strictly liable for an act of a deputy constable without any consideration of the constable's own diligence, participation, or ratification of the wrongful acts. In *Rich*, however, the deputy's wrongful act consisted not of a tort, but in failing to carry out an affirmative duty to levy execution. In such cases the liability of a sheriff or constable appears to be strict, and care needs to be taken to distinguish these cases from those involving common law torts.

[2] In the instant case the jury found that deputy Bolt committed an assault and battery against Williams. Because Williams presented no evidence at trial that Sheriff Thomas participated, authorized, or ratified the assault and battery, or that he was negligent in his administration of the County

Jail or in his hiring or supervision of deputies, the Court dismissed all claims against Thomas. For the reasons stated above, the Court remains convinced that its action was the appropriate one and that Thomas cannot be held liable on a theory that a sheriff is absolutely responsible for all acts of his deputies as urged by Williams.

Good Faith, vis a vis, The Civil Rights Act and Assault and Battery

Bolt asserted as an affirmative defense that he acted in good faith on the occasion giving rise to Williams' claim, and that he was thus immune from liability to Williams. The qualified immunity standard for public officials upon which Bolt relies was enunciated by the Supreme Court in *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). A dual test calling for an objective and a subjective evaluation of the official conduct in question was established. See *Bryan v. Jones*, 530 F.2d 1210, 1214 (5th Cir. 1976) (en banc), cert. denied, 429 U.S. 865, 97 S.Ct. 1714, 50 L.Ed.2d 145 (1976).

Bolt, in his brief opposing Williams' motion for judgment, argues that the jury's finding that he acted in good faith in connection with Williams' §1983 claim should relieve him of liability for assault and battery. On this contention, the Court is of the opinion (1) that such finding fails to provide a defense to the Texas tort of assault and battery, and (2) that the Court's charge to the jury in regard to the good faith defense under §1983 was in error, and that as a matter of law Bolt could not have acted in good faith as that term is understood under the objective prong of the relevant test for immunity.

[3] Looking first to the law of assault and battery, the Court is unable to find any authority for the proposition that good faith operates as a defense to assault and battery when such tort is committed by a peace officer. There does exist a doctrine of official immunity which privileges duly

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authorized peace officers to use force in the course of their duties. As formulated by the American Law Institute:

A public officer acting within the general scope of his authority is not subject to tort liability for an administrative act or omission if

(a) he is immune because engaged in the exercise of a discretionary function,

(b) he is privileged and does not exceed or abuse the privilege, or

(c) his conduct was not tortious because he was not negligent in the performance of his responsibility.

Restatement of Torts, Second, §895D (3). The following comments are then made regarding the scope of official authority:

An immunity protects an officer only to the extent that he is acting in the general scope of his official authority. When he goes entirely beyond it and does an act that is not permitted at all by that duty, he is not acting in his capacity as a public officer or employee and he has no more immunity than a private citizen.

* * * * *

In many cases an officer is under a duty to make a preliminary determination of whether he has the authority or jurisdiction. When he exercises discretion in making that decision and takes action pursuant to it, he is performing his official duty and will still be protected by the immunity for discretionary conduct, even though his decision is erroneous.

* * * * *

If the officer's authority is limited to the exercise of a discretionary judgment in good faith, he must act in good faith but his judgment is not otherwise subject to question.

Restatement of Torts, Second, §895E, Comment (g). Good faith is not wholly irrelevant to official immunity, but it only comes into play when a public officer has made an error-

eous decision as to the scope of his authority; it is a defense to a claim for damages arising out of an excusable cognitive jurisdictional mistake.

In the instant case Bolt made no conscious preliminary determination as to jurisdiction or authority. The jury found on the §1983 claim that he used excessive force against Williams; that is, that he used force greater than was reasonably necessary to prevent injury or maintain discipline, and that the force used was greater than that which a detention officer of ordinary prudence would have used. Such a finding in these circumstances negates any possibility of a preliminary inquiry into authority or jurisdiction on the part of Bolt. He made no cognitive, discretionary error as to scope of his authority. Though Bolt's use of excessive force obviously involved some type of nonautomatic decision-making, it was not the type of mistaken decision which the official immunity doctrine shields. Though the boundary line between excessive and non-excessive force may be indistinct, there can be no question that excessive force is never authorized and that its utilization results from factors other than cognitive error as to jurisdiction.

[4, 5] The Texas Penal Code sets out the following standards justifying activity which might otherwise be criminally culpable:

[A] guard employed by a penal institution is justified in using any force, including deadly force, that he believes to be immediately necessary to prevent the escape of a person from a jail . . .

V.T.C.A., Penal Code §9.52.² Williams was not, of course, at any time attempting to escape. The above statute does, however, endorse the general notion of official immunity as an incident of official authority, and it cannot be doubted that the privilege to prevent escape implies the privilege to main-

²Though the above statute addresses only criminal liability, its standards also govern civil liability. See 6 Tex.Jur.2d Assault and Battery § 135.

tain discipline among inmates in custody. But, the bounds of that privilege are two-fold: the actor must be (1) a guard at a penal institution acting with a view to prevent an escape and (2) he must believe his use of force to be immediately necessary. In more general terms (1) he must be acting pursuant to lawful authority and (2) his use of force cannot be justified unless he believes and circumstances are such to warrant a reasonable belief that force is necessary. Good faith is relevant in a negative sense only—a guard's lack of belief in the necessity of the immediate use of force would nullify his justification despite the official character of his acts. Similarly, a guard's commission of acts unquestionably beyond the scope of his official duty—as, for instance, the use of excessive force—would nullify his justification despite his belief in their immediate necessity. Both elements must be present for a public official to prevail on a defense of justification.

Given a finding of excessive force in this case, a further finding of good faith cannot alone provide a defense. It is simply impossible at law to use excessive force in the course of official duty. The Court recognizes that the case law in this area is rather sparse, and, though it appreciates the necessity of allowing prison authorities wide discretion in disciplining prisoners, it cannot acquiesce in the proposition that excessive force can be immunized from liability merely by a detention officer's sincere conviction that such excessive force represents the best response to a perceived problem of prison discipline.

[6] Looking then to the good faith defense as it applies to the Civil Rights Act of 1870, 42 U.S.C. §1983, the Court charged the jury:

Even though it may be determined that a detention officer in the course of his duties did use excessive force against a prisoner, he will nevertheless have a complete defense to his actions in a civil suit such as this one if he can show that under the circumstances and acting as an ordinary and prudent detention officer

he entertained a good faith belief that his actions were lawful and it was reasonable, under the circumstances surrounding his actions, to believe that those actions were lawful. "Reasonable good faith" is a two-pronged inquiry. There must be both a subjective good faith belief that the acts taken were legal, and the existence of reasonable grounds for that belief. There must be more than a mere showing of good intentions. "Reasonable good faith" means here an objective basis for the belief that the use of force was lawful.

Upon reconsideration, and especially in light of the recent decision of *Dilmore v. Stubbs*, 636 F.2d 966 (5th Cir. 1981), the Court is of the opinion that the objective prong of the good faith defense should be essentially a legal determination based not on the existence of *any* objective basis for a given belief in the lawfulness of a course of conduct, but rather based upon the reasonableness of an act given the state of the law as it existed at that time. As expounded by *Dilmore*:

Under the objective standard, even an official who acts in the sincere subjective belief that his actions are proper will lose his qualified immunity if those actions contravene "settled, indisputable law." [citations omitted] An official is thus liable under § 1983 "if he knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights" of the person affected. [citations omitted]. But "[t]he fulcrum for the objective first half of [*Wood v. Stickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975)] is the existence, at the time of the official's action, of clearly established judicial decisions that make his action unconstitutional." [citations omitted]. We do not expect an official to predict the future course of constitutional law [citations omitted], but "he will not be shielded from liability if he acts with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot

reasonably be characterized as being in good faith." [citations omitted].

636 F.2d at 968-969.

[7] Consequently, the Court concludes that the use of excessive force against prisoners necessarily involves the violation of well-established constitutional norms regarding the treatment of prisoners. There are no subtle or shifting constitutional nuances at issue here. Williams alleged, and the jury apparently found, that Bolt grabbed Williams, slammed him against a wall, threw him to the floor and kicked and beat him, all such being in excess of that force necessary under the circumstances. Such behavior clearly violates a prisoner's constitutional right to be free from such unjustified assaults. As a matter of law no "good faith" defense was applicable in this action.

Attorney's Fees

Section 1988 of Title 42, United States Code, provides in part:

In any action or proceeding to enforce a provision . . . [section] 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Although the statute phrases the court's power as discretionary, recent cases have emphasized that in the absence of special circumstances, which would make the award of attorney's fees unjust, "attorney's fees should be awarded to the prevailing party as a matter of course." *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir. 1980). The first question for decision, then, is whether Williams is the "prevailing party" as that term is used in § 1988.

The jury found that Bolt used excessive force against Williams in violation of his constitutional rights, but that Williams suffered no money damages as a result of that

violation.³ Consequently, the Court is faced with determining whether the establishment of a constitutional violation coupled with an explicit finding that the violation caused no damages can support a conclusion that Williams prevailed on his federal civil rights claim so as to be entitled to the recovery of attorney's fees. The Court of Appeals for the Fourth Circuit has recently made the following observations concerning attorney's fees:

If . . . there is initially a genuine dispute as to whether the plaintiff fee claimant is a "prevailing party," inquiry on that question might well proceed first. This inquiry is properly a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy. Its initial focus might well be on establishing the precise factual legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff's fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.

Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979).

[8] In the instant case Williams has received no tangible gain as a compensation for the constitutional violation. From a purely pecuniary point of view he has not moved from the "benchmark." At the same time, however, he has vindicated his constitutional rights by bringing this action and

³As to the state assault and battery claim the jury found that Bolt committed an assault and battery against Williams and awarded \$500 in compensation for his damages. For reasons set out previously, the jury's finding as to good faith cannot operate in this situation as a defense and Williams has clearly prevailed on this claim.

establishing a violation. "Without question a party who vindicates important rights 'prevails' for purposes of a § 1988 award, even though he or she does so without obtaining a formal judicial order." *Miller v. Carson*, 628 F.2d 346 (5th Cir. 1980). This Court is of the opinion that Williams is a prevailing party for § 1988 purposes and is entitled to an award of attorney's fees.

[9, 10] Considering Williams' compensation award for the assault and battery, *see* note 3, *supra*, the Court is of the opinion that, standing alone, such a recovery could not provide a basis for attorney's fees under § 1988. Although a number of cases have awarded attorney's fees after a plaintiff prevailed solely on a pendent state claim, those cases have invariably involved an intentional decision by a court to avoid a difficult constitutional question when recovery on a more well-established non-constitutional basis would fully compensate the plaintiff for his claimed injuries. *See Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980), *citing at 1275, Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977). In the instant case the Court did not preclude the consideration of Williams' constitutional claims or make consideration of them in any way contingent on the outcome of Williams' assault and battery claims. The Court continues to be of the opinion that such a course was correct insofar as there is no necessary congruity between federal constitutional claims and state tort claims. It is well established that only a narrow range of state torts constitute federal civil rights offenses, *Williams v. Kelley*, 624 F.2d 695 (5th Cir. 1980), and *cases cited therein*, and consequently the Court could not infer from a simple recovery on an assault and battery claim that Williams "prevailed" on his civil rights claim, a prerequisite to recovery of attorney's fees under § 1988.

[11] As a final matter regarding the issue of whether Williams is a prevailing party, the Court would alternatively hold that, should Williams' uncompensated vindication on the constitutional claim prove somehow insufficient in itself to justify his designation as a prevailing party, the jury's

finding as to the assault and battery, though itself alone insufficient to justify an award, taken in conjunction with the jury's finding of a constitutional violation arising out of precisely the same incident, supports the conclusion that Williams, by and large, prevailed on his § 1983 claim and is entitled to attorney's fees under § 1988.

[12] Despite the contentions of Williams that attorneys fees may be assessed against the Dallas County Sheriff's Department or Dallas County, the Court must conclude that the assessment of fees must be against Bolt himself, who was sued, not in his official capacity, but individually. The cases cited by Williams in this regard in his Brief in Support of Motion for Judgment all deal with either the abrogation of eleventh amendment sovereign immunity by the congressional enforcement clause of the fourteenth amendment, or the liability of unnamed state or municipal entities for constitutional violations committed by public officials sued in their *official* capacity. The Court sees no reason why the assessment of attorney's fees should not be co-terminous with the assessment of substantive liability. There is also considerable doubt whether fees can be assessed against an entity never formally before the Court. *Cf. Dean v. Gladney*, 621 F.2d 1331 (5th Cir. 1980).

In determining an appropriate amount of attorney's fees the Court looks first to the relevant standards of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The facts of this action were not complex, Williams having charged that Bolt used excessive force against him while he was incarcerated at the Dallas County Jail. Customary fees in this area in cases such as this range from \$3000 to \$5000. As to results obtained, Williams recovered no damages on his constitutional claim and only \$500 on his assault and battery claim. The claim against Sheriff Thomas was dismissed and the jury exonerated the defendant Smith, another detention officer. Williams' attorneys, associates of a large Dallas law firm, handled the case in a very competent manner, although the Court notes that this was the first federal jury trial for which Williams' lead counsel had full responsibility from beginning to end. Customary hourly rates

for attorneys with experience equal to Williams' counsel range from \$50 to \$60. It was understood from the beginning that, should Williams lose his case, his counsel would take nothing, and the Court has taken this contingency factor into account. Further, considering all aspects of the case, the some 400 hours devoted by Williams' counsel to this action were excessive.

[13, 14] Although the ability of a plaintiff to pay his attorneys in cases such as this is largely irrelevant, *Bunn v. Central Realty of Louisiana*, 592 F.2d 891 (5th Cir. 1979), the hardship imposed on a losing defendant is a factor which a court may take into account, *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980). In passing on the hardship that the assessment of a fee would have on Bolt, *Knighton v. Watkins*, *supra*, no evidence was introduced during the hearing on attorneys fees going to the ability of Bolt to pay such fees or Bolt's coverage by any insurance or other contractual indemnification arrangements. The Court may infer, however, that Bolt, as a county jail detention officer, is probably an individual of modest means who can ill afford to pay the full attorney's fee that this action might justify. The Court has also taken this into account in determining the fee to be assessed.

Taking the above factors into consideration, the Court is of the opinion that the sum of Two Thousand Five Hundred Dollars (\$2500) is a reasonable attorney's fee and that said sum should be assessed as costs against Bolt for the use and benefit of Williams' counsel. The Court is aware that such fee award fails to fully compensate Williams' counsel for their time, but would hope that the experience gained will prove beneficial. The Court has had to take into consideration that in a suit primarily brought to recover money damages, this relatively modest attorney's fee award is still some five times more than the total damage recovery. All things considered, the Court feels that the above amount represents a fair and just fee. The prosecution of this action by Williams' counsel who volunteered their services with little hope of remuneration represented selfless advocacy in the best tradition of the bar, which fact the Court here wishes to publicly acknowledge.

It is so ORDERED.

**AMENDMENT VIII — EXCESSIVE BAIL, FINES,
PUNISHMENTS**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**AMENDMENT XIV — CITIZENSHIP; PRIVILEGES AND
IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;
APPORTIONMENT OF REPRESENTATION; DIS-
QUALIFICATION OF OFFICERS; PUBLIC DEBT;
ENFORCEMENT**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or

hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L.96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

**§ 1988. Proceedings in vindication of civil rights;
attorney's fees**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

Rule 15. Amended and Supplemental Pleadings

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given

when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) *Supplemental Pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

**In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

Civil Action No. CA-3-79-0385-D

DONALD WILLIAMS,

Plaintiff,

v.

**SHERIFF CARL THOMAS, OFFICER JOSEPH E. BOLT, SR.,
and OFFICER LARRY SMITH,**

Defendants.

COURT'S CHARGE TO THE JURY

Members of the Jury:

Now that you have heard the evidence and the argument of counsel, it is my duty to give you the Court's instructions as to the laws that are applicable to this case. In arriving at your verdict, and in your deliberations, it is your duty to follow these instructions and to apply the rules of law here given to you and to find the facts of this case from the evidence introduced at the trial and in accordance with these rules of law.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

You are the sole and exclusive judges of the facts. You should determine from these facts without any bias, prejudice, sympathy, fear, or favor, and this determination should be made from a fair consideration of all the evidence that you have seen and heard in this trial. Do not speculate on matters which are not in evidence, and you should never discuss this case with anyone until such time as you are discharged, except among yourselves when you have been retired to deliberate your verdict.

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You are not bound by any opinion which you might think the court has concerning the facts of this case, and if I have in any way said or done anything which leads you to believe that I have any opinions about the facts in this case, you are here instructed to disregard it. Further, nothing in these instructions to you is made for the purpose of suggesting or conveying to you an intimation as to what verdict I think you should find.

You are instructed that the statements and arguments of counsel are not evidence. They are only intended to assist the jury in understanding the evidence and the position and contentions of the parties to this suit. The jury should not consider or be influenced by the fact that during the trial of this case, counsel have made objections to the testimony, as it is their duty to do so, and it is the duty of the Court to rule on them in accordance with the law.

It is the function of the jury to determine the credibility of each witness and to determine the weight to be given his testimony. In weighing the testimony of a witness, you should give that testimony careful scrutiny. Consider all of the circumstances under which the witness testified, his appearance and demeanor while on the witness stand, his apparent candor and fairness, or the lack thereof, the reasonableness or unreasonableness of his testimony, the interest, if any, he has in the outcome of the case, and the extent to which he is contradicted or supported by other credible evidence. You will rely on your own good judgment and common sense in considering the evidence and determining the weight to be given it.

The burden is upon the Plaintiff to prove every essential element of his claim by a preponderance of the evidence, unless I instruct you otherwise. Likewise, the burden is upon those asserting affirmative defenses to prove every essential element of that defense by a preponderance of the evidence, unless I instruct you otherwise.

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"Preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, is more convincing and produces in your mind the belief that what is sought to be proved is more likely true than not true. In determining whether any fact in issue has been proven by a preponderance of the evidence, you should consider the testimony of all witnesses and all exhibits received in evidence, regardless of who may have introduced them. Preponderance of the evidence does not require proof to any absolute certainty, because such a degree of proof is seldom possible.

The testimony of a single witness, which produces in your minds the belief in the likelihood of truth, is sufficient for the proof of any fact, even though a greater number of witnesses may have testified to the contrary, if you believe this witness and have considered all the other evidence.

Generally speaking, there are two types of evidence which a jury may consider in properly finding the truth as to the facts in the case. One is direct evidence — such as testimony of an eye-witness. The other is indirect or circumstantial evidence — the proof of a chain of circumstances which points to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from a preponderance of all the evidence, both direct and circumstantial.

Evidence has been admitted that Donald Williams and another witness have been convicted of certain felony offenses. This is a factor which you may consider in weighing the credibility or believability of these witnesses. The fact of such a conviction does not necessarily destroy the witness' credibility, but is one of the circumstances you may take into account in determining the weight to be given their testimony. You may not consider these convictions for any other purposes.

Do not decide who you think should win and then try to answer the questions. You will not decide any issue by lot,

by drawing straws, or by the use of any other method of chance. Further, do not do any trading on your answers as your answers and verdict must be unanimous; that is, all of the jurors must agree to each of your answers.

I will now summarize for you the contentions of the parties to this lawsuit. My summary is not evidence, and is not intended in any way to indicate to you how to determine the facts.

Plaintiff's Contentions

Donald Williams (Williams), plaintiff, was an inmate in the Dallas County Jail on February 21, 1979. He contends that on said date he was injured by Dallas County Sheriff's deputies defendants Joseph A. Bolt, Sr. (Bolt) and Larry Smith (Smith). More specifically, Williams contends that he was assaulted when Bolt grabbed him, slammed him against the wall, threw him to the floor and kicked and beat him. He contends Smith also participated in the assault. Williams contends that Bolt and Smith, for no reason or justification, used excessive force against him which was intentional, wrongful conduct. Williams was returned to his cell where he remained until the jail nurse saw him and referred him to the jail doctor, who, in turn, had Williams sent to Parkland Hospital because of his alleged injuries. He seeks to recover compensatory damages and punitive damages against Bolt and Smith. Williams has also sued Sheriff Carl Thomas, but his claims against Sheriff Thomas are no longer before you and should not be considered by you in your deliberations.

Williams seeks recovery under Title 42 United State Code § 1983 claiming that his constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution have been violated and under the laws of the State of Texas for assault and battery.

Defendants' Contentions

Bolt and Smith deny that they slammed Williams against the wall, threw him to the floor or that they kicked or beat

Williams in any way. They contend that only reasonable force was used in dealing with Williams on the occasion in question.

Bolt and Smith further assert as a defense that they at all times acted in a good faith belief in the propriety of their actions in their dealings with Williams.

I will now instruct you as to the applicable law and define certain terms which will guide you in your deliberations.

The claims of Williams are based both upon federal and State law. I will first instruct you as to the federal law claims and then instruct you as to the State law claims.

The federal claims of Williams are brought under § 1983 of Title 42 of the United States Code which provides:

Every person who, under color of [State law] . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . for redress.

This law was enacted pursuant to the Fourteenth Amendment of the Constitution of the United States which provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law.

The Eighth Amendment to the Constitution of the United States provides:

Excessive bail shall not be required, or excessive fine imposed, nor cruel and unusual punishments inflicted.

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In this case, the court has determined that the actions of Bolt and Smith were done under the color of state law. Therefore, you are to take this fact as established in making your determination.

You are instructed that regardless of Williams' confinement, he at all times had the legal right not to be deprived of any liberty protected by the Constitution or laws of the United States, except by due process of law. To be deprived of liberty "without due process of law" means to be deprived of liberty without authority of law. In this regard, Williams has the same legal rights as have the defendants and as all people living in the United States.

You may assume that Williams, at the time of the incident, had already been deprived of certain of his liberties, namely, his liberty to be free of confinement, but that such deprivation was with due process of law. Regardless of his confinement, Williams still had the liberty to be free from any unlawful attacks upon his physical and mental well-being and integrity. It has always been the policy of the law to protect the physical integrity of every person from unauthorized violation or interference. So Williams, even while confined in jail, had the right under the United States Constitution not to be deprived of this remaining liberty without due process of law.

In this case, Williams contends that he was beaten by Bolt and Smith while in the Dallas County Jail and that he was deprived of liberty without due process of law.

A detention officer in a jail is justified in using force against a prisoner only when he reasonably believes that the force is necessary to restrain an individual he believes is about to injure himself or another or to maintain discipline. The amount of force used must be no greater than reasonably necessary to prevent the injury or to maintain discipline.

In determining whether or not any of the defendants acted beyond the bounds of "reasonable force," you are instructed

that "reasonable force" means the use of no greater force than necessary to restrain an inmate or maintain discipline. In determining whether reasonable force has been exceeded, you must consider all the facts and circumstances involved in the incident in question. "Reasonableness" or what is "reasonable," as applied to the defendants, is to be measured against what a law enforcement officer of ordinary prudence under the same or similar circumstances would have done.

You are instructed that a small amount of force by a detention officer may be a violation of a prisoner's constitutional right not to be deprived of liberty without due process. The factors you must consider when force is used are the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted and whether force was applied in a good faith effort to maintain discipline or for the very purpose of causing harm.

Although the plaintiff has the burden of proving that his rights were violated, the burden of showing good faith or justification is upon the defendant officials. In other words, the plaintiff need not prove lack of good faith or lack of justification.

If you determine that the defendants did use an unreasonable amount of force against Williams, then you will be asked to make a further determination. You will be asked to determine whether or not the defendants acted in good faith with a reasonable belief in the validity of their acts. Even though it may be determined that a detention officer in the course of his duties did use excessive force against a prisoner, he will nevertheless have a complete defense to his actions in a civil suit such as this one if he can show that under the circumstances and acting as an ordinary and prudent detention officer he entertained a good faith belief that his actions were lawful and it was reasonable, under the circumstances surrounding his actions, to believe that those actions were lawful. "Reasonable good faith" is a two-pronged inquiry. There must be both a subjective good faith belief that the

acts taken are legal, and the existence of reasonable grounds for that belief. There must be more than a mere showing of good intentions. "Reasonable good faith" means here an objective basis for the belief that the use of force was lawful.

If you find that any of the defendants used force in excess of reasonable force on the occasion in question, you must then decide whether the use of such force proximately caused injuries to Williams, and, if so, the amount of damages he has suffered.

By the term "proximate cause" as used in this charge is meant that cause which, in a natural and continuous sequence, produces an event, without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

I will now instruct you as to the laws of the State of Texas as they relate to Williams State claim of assault and battery.

Williams contends that the actions of Bolt and Smith amount to assault and battery. You are instructed that a "battery" is the non-consenting touching in an offensive manner of a person or anything connected with a person. An "assault" is any attempt to commit a battery or any threatening gesture showing in itself or by words accompanying it an immediate intention coupled with an ability to commit a battery.

You are instructed that Bolt and Smith committed an assault and battery on Williams under the laws of Texas only if they used force in excess of that "reasonable force" necessary under the circumstances.

"Reasonable force" was defined for you in regard to the federal claim, and you are referred back to that definition.

You are further instructed that self-defense is a defense to an action for assault and battery. A person unlawfully assaulted has a right to repel the assault and prevent injury to himself by the use of such means as may be reasonably necessary under the circumstances. In order to exercise the right of self-defense, a person must honestly believe himself to be in immediate danger and must have reasonable grounds for this belief. Likewise, self-defense must not exceed the bounds of defense and prevention. Only that degree of force reasonably necessary to repel the threatened violence may be used.

In determining the amount of Williams' damages, if any, you may award him actual damages for his mental suffering and emotional anguish caused by the alleged wrongful acts.

In determining the amount of damages, if any, suffered by Williams, you may take into account the fright, shock, mental suffering, physical suffering, embarrassment and humiliation, if any, suffered by Williams caused by the use of excessive force on the occasion in question. The hurt done to feelings and to reputation by an invasion of constitutional rights is no less real and no less compensable than the cost of repairing damage to property.

As I have stated, Williams seeks punitive damages in this case. Punitive damages are an amount which you may in your discretion award as an example to defendants and others, as a penalty or by way of punishment, in addition to any amount which you may find as actual damages. Punitive damages are awardable only if you find that one or more of the defendants acted maliciously toward Williams. A malicious act is one which is done out of ill will or spite or is plainly intended to harm another.

The amount of punitive damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party in the case.

QUESTION NO. 1

Do you find from a preponderance of the evidence that defendants Bolt and Smith used force in excess of that "reasonable force" necessary under these circumstances as presented to you in this case?

Answer by placing a check () mark opposite *one* of the following statements as to each defendant.

ANSWER:

Bolt

- (a) Did use force in excess of reasonable force ✓
- (b) Did not use force in excess of reasonable force

Smith

- (a) Did use force in excess of reasonable force
- (b) Did not use force in excess of reasonable force ✓

If you have found in Question No. 1 that either or both of the defendants Bolt and Smith "Did use force in excess of reasonable force," then answer Question No. 2 as to the defendant(s) which you have so found.

QUESTION NO. 2

Do you find from a preponderance of the evidence that defendants Bolt and Smith acted in reasonable good faith in using an unreasonable amount of force against Williams?

Answer by placing a check () mark opposite *one* of the following statements as to each defendant as to whom you answered in Question No. 1 "Did use force in excess of reasonable force."

ANSWER:

Bolt

- (a) Did act in reasonable good faith ✓
(b) Did not act in reasonable good faith

Smith

- (a) Did act in reasonable good faith
(b) Did not act in reasonable good faith

If you have found in Question No. 1 that either or both of the defendants "Did use force in excess of reasonable force," then answer Question No. 3 as to the defendant(s) which you have so found.

QUESTION NO. 3

Do you find from a preponderance of the evidence that Williams suffered injuries as a proximate cause of the use of an unreasonable amount of force against him?

Answer by placing a check () mark opposite one of the following statements as to each defendant as to whom you answered in Question No. 1 "Did use force in excess of reasonable force."

ANSWER:

He did suffer

He did not suffer

Bolt

✓

Smith

If you have found in answer to Question No. 3 that "He did suffer" in respect to either or both of the defendants, then answer Question No. 4 as to the defendant(s) which you have so found.

QUESTION NO. 4

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably

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compensate Williams for the damages which were proximately caused by the use of excessive force against him?

Answer in dollars and cents, if any, as to each defendant as to whom you answered Question No. 3 "He did suffer."

ANSWER:

Bolt

NONE

Smith

If you have found in Question No. 1 that either or both of the defendants "Did use force in excess of reasonable force," then answer Question No. 5 as to the defendant(s) which you have so found.

QUESTION NO. 5

Do you find from a preponderance of the evidence that either or both of defendants Bolt and Smith acted with malice in using unreasonable force against Williams?

Answer by placing a check () mark opposite one of the following statements as to each defendant as to whom you answered in Question No. 1 "Did use force in excess of reasonable force."

ANSWER:

Bolt

- (a) Acted with malice.
- (b) Acted without malice.

✓

Smith

- (a) Acted with malice.
- (b) Acted without malice.

If you have found in answer to Question No. 5 that either or both of the defendants Bolt and Smith "Acted with malice," then answer Question No. 6 as to those defendants which you have so found.

QUESTION NO. 6

From a preponderance of the evidence, what sum of money, if paid now in cash, should be awarded Williams as punitive damages for the malicious use of unreasonable force against him?

Answer in dollars and cents, if any, as to each defendant as to whom you answered in Question No. 5 "Acted with malice."

ANSWER:

Bolt

Smith

QUESTION NO. 7

Do you find from a preponderance of the evidence that either of the defendants named below committed an assault or battery upon Williams?

Answer "Yes" or "No" in Column 1 and 2 in each space provided below for each name.

If any of your answers in Column 1 or 2 is "Yes," do you find from a preponderance of the evidence that any such assault or battery was a proximate cause of injuries, if any, suffered by Williams?

Answer "Yes" or "No" on the corresponding line of Column 3.

If any of your answers in Column 1 or 2 is "Yes," do you find from a preponderance of the evidence that the assault or battery was committed with malice?

Answer "Yes" or "No" on the corresponding line of Column 4.

Name	Column 1 Assault	Column 2 Battery	Column 3 Proximate Cause	Column 4 Malice
Bolt	Yes	Yes	Yes	No
Smith	No	No		

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If any of your answers in Column 1 or 2 of Question No. 7 are "Yes," then answer Question No. 8.

QUESTION NO. 8

Do you find from a preponderance of the evidence that any of the defendants who committed an assault or battery on Williams acted in self-defense?

Answer "Yes" or "No" as to each of the following defendants as to whom you answered "Yes" in Column 1 or 2 to Question No. 7.

ANSWER:

Bolt

NO

Smith

If you have answered "Yes" in Column 1 or 2 of Question No. 7 and "No" to Question No. 8 as to any defendant(s), then answer Question No. 9 as to any defendant(s) you have so found.

QUESTION NO. 9

What amount of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Williams for the assault and/or battery committed by each defendant?

Answer in dollars and cents, if any, as to each defendant who you found committed assault and/or battery in answer to Question No. 7 and was not acting in self defense in answer to Question No. 8.

ANSWER:

Bolt

\$500.00

Smith

If you have answered "Yes" in Column 1 or 2 and Column 4 of Question No. 7, then answer Question No. 10.

QUESTION NO. 10

What sum of money, if any, do you find from a preponderance of the evidence that Williams should be awarded as punitive damages based on assault and/or battery of him by defendants?

Answer in dollars and cents, if any, as to any defendants as to whom you answered "Yes" in Column 1 or 2 and Column 4 of Question No. 7.

ANSWER:

Bolt

Smith

If during the course of your deliberations, you wish to communicate with the Court, you should do so only in writing by a written note handed to the deputy marshal and signed by the Foreman.

You shall now retire to the jury room to deliberate upon your verdict and you may take this charge with you as well as exhibits which the Court has admitted into evidence. You will select your foreman, and after you have reached your verdict, you will return this charge together with your written answers to the foregoing interrogatories. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me.

Your Foreman will sign in the space provided after you have reached your verdict.

/s/ Robert M. Hill
United States District Judge

Date:

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return the same into Court as our verdict.

/s/ Lucretia Watson
Foreman

Office-Supreme Court, U.S.
FILED

MAY 31 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-1792

IN THE
**Supreme Court of the
United States**

OCTOBER TERM, 1982

DALLAS COUNTY, TEXAS,
Petitioner,

v.

CARL THOMAS, ET AL.,
Respondents,

v.

DONALD WILLIAMS,
Respondent.

**RESPONDENT DONALD WILLIAMS' BRIEF
IN OPPOSITION TO PETITION
FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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No. 82-1792

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**RESPONDENT DONALD WILLIAMS' BRIEF
IN OPPOSITION TO PETITION
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CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STATEMENT OF THE CASE

**A. Course of Proceedings and Disposition in
Courts Below**

1. The Pleadings

Respondent Donald Williams ("Williams") instituted this suit *pro se* against Dallas County Sheriff Carl

Thomas ("Thomas"), Lieutenant George Williams, and Deputy Sheriffs Joseph E. Bolt, Sr. ("Bolt"), and Larry Smith ("Smith") seeking relief under the Civil Rights Act, 42 U.S.C. § 1983. Williams alleged that he "was grab [sic] by Officer Boat [sic] and slam [sic] to the wall and then to the floor."

On August 29, 1979, counsel was appointed to represent Williams. Prior to trial, Williams filed an amended complaint alleging that Deputy Bolt's actions constituted excessive force in violation of Williams' constitutional rights and constituted an assault and battery under state law.

Respondent Bolt and the other original defendants were represented by the Dallas County District Attorney's office pursuant to Tex. Rev. Civ. Stat. Ann. art. 332c § 2 (Vernon Supp. 1982) which provides:

In any suit instituted by a nonpolitical entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney, or both, shall, subject to the provisions contained in Section 3, represent the official or employee of the county *if the suit involves any act of the official or employee while in the performance of public duties.*

Fifth Circuit opinion, Petitioner's Appendix A-17 (emphasis added).

Thomas denied that he directed, approved, ratified, affirmed, or had any knowledge of any unlawful

¹ Amazingly, Petitioner Dallas County, Texas argues that because Defendant-Respondent Bolt's name was misspelled in Williams' *pro se* complaint, Bolt "was not named in the Original Complaint [and thus] there was no claim by Plaintiff that he was sued in his official capacity." [Petition for a Writ of Certiorari 5.]

act by any person against Williams. Officers George Williams, Bolt, and Smith denied that they slammed Williams against the wall or floor or that they kicked or beat him and contended that only the minimum force necessary, if any, was used in dealing with Williams.

In the Pretrial Order, the parties stipulated that "[a]t all relevant times, Thomas, George Williams, Bolt, and Smith were acting under color of state law." Moreover, the parties stipulated that "Bolt was a Deputy Sheriff for the Dallas County Sheriff's Office on [the date of the altercation between Williams and Bolt.]"

2. The Jury Verdict and Judgment

Following a jury trial, and after the trial court dismissed the action as to Thomas, the jury found as follows:

Section 1983 Claim

1. (a) Bolt used excessive force against Williams.
(b) Smith did not use excessive force against Williams.
2. Bolt acted in reasonable good faith.
3. Bolt's use of unreasonable force was a proximate cause of Williams' injuries.
4. Williams was entitled to no monetary compensation for Bolt's use of unreasonable force against him.
5. In using unreasonable force Bolt acted without malice.
6. Based on its finding that Bolt acted without malice,

the jury was not required to make a finding as to punitive damages.

Assault and Battery Claim

7. (a) Bolt committed an assault and battery against Williams, and such assault and battery was a proximate cause of Williams' injuries, though inflicted without malice.

(b) Smith did not commit assault and battery against Williams.
8. In committing an assault and battery against Williams, Bolt was not acting in self-defense.
9. Williams was entitled to Five Hundred Dollars (\$500) as compensation for Bolt's assault and battery against him.
10. Based on its finding that Bolt acted without malice, the jury was not required to make a finding as to punitive damages.

District court opinion and jury charge, Petitioner's Appendix B-8; D-10-15.

Based upon this jury verdict and after a hearing on attorney fees, the trial court entered judgment against Bolt awarding Williams \$500 in damages and \$2,500 in attorney fees, both with interest at the legal rate, and costs. (District court judgment, Petitioner's Appendix B-1.)

Bolt appealed from the trial court's judgment and Williams perfected a cross-appeal from the amount of attorney fees awarded by the trial court.

3. The Opinion of the Fifth Circuit Court of Appeals

The United States Court of Appeals for the Fifth Circuit affirmed the district court's award of \$500.00 in compensatory damages, reversed the district court's inadequate award of attorney fees and remanded the case for a determination of the proper amount of attorney fees due, holding that the attorney fee award lies against Dallas County, the employer of Respondent Bolt. (Fifth Circuit opinion, Petitioner's Appendix A-20.)

B. Statement of Facts

Williams was an inmate in an all-black cell in the Dallas County jail on February 21, 1979.² During an incident concerning another inmate, Officer Bolt grabbed Williams and slammed him against the wall and floor. As a result of Officer Bolt's actions, Williams received injuries which required examination by a nurse and later a doctor who referred Williams to Parkland Hospital for further examination. The Dallas County Jail Medical Records indicate that Williams sustained bruises on his left side, left arm, and wrist.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit was correct in its holding that Respondent Donald Williams was a prevailing party under Section 1988 of Title 42 of the United States Code ("§ 1988") in that there were no special circumstances which would render such a fee award unjust. Further, Williams prevailed on his state pendent claim of assault and battery and this Court has

² See the more complete factual background as set forth by the Fifth Circuit Court of Appeals. (Petitioner's Appendix A-5-6.)

held that a plaintiff's success on a pendent state claim entitles him to attorney fees under § 1988. See *Maher v. Gagne*, 448 U.S. 122 (1980). Moreover, Respondent Williams prevailed on his constitutional claim in that the jury found that Respondent Bolt used excessive force against Williams.

Secondly, the United States Court of Appeals for the Fifth Circuit was correct in its holding that Dallas County should be liable for payment of attorney fees because this Court has clearly established that an attorney fee award may lie against the public employer of Respondent Bolt even though Petitioner Dallas County, Texas was not named as a party in the litigation. See *Hutto v. Finney*, 437 U.S. 678 (1978).

ARGUMENT

A. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN ITS HOLDING THAT RESPONDENT DONALD WILLIAMS WAS A PREVAILING PARTY UNDER 42 U.S.C. § 1988

1. Williams was Entitled to Attorney Fees as a "Prevailing Party"

The Civil Rights Attorney's Fees Awards Act of 1976, codified in § 1988, provides, in relevant part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980), this Court emphasized that § 1988 “states that fees are available in any § 1983 action” (original emphasis) and further remarked:

The legislative history is entirely consistent with the plain language. As was true with § 1983, a major purpose of the Civil Rights Attorney’s Fees Awards Act was to benefit those claiming deprivations of constitutional and civil rights. Principal sponsors of the measure in both the House and the Senate, however, explicitly stated during the floor debates that the statute would make fees available more broadly.

448 U.S. at 9.

It has been recognized that the courts “have taken an extremely liberal view on nearly every interpretive question that has arisen thus far under § 1988.” *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir. 1980). See, e.g., *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982) (Court held that request for an attorney fee award under § 1988 was not a “motion to alter or amend the judgment” subject to ten-day statutory standard); *Maher v. Gagne*, 448 U.S. 122 (1980) (Under § 1988 the district courts’ authority to award attorney fees is not limited to cases in which § 1983 is invoked as a remedy for a constitutional violation or a violation of a federal statute providing for the protection of civil or equal rights; fact that respondent prevailed through a settlement rather than through litigation does not preclude respondent from claiming attorney fees as the “prevailing party” within the meaning of § 1988; district court is not barred by the Eleventh Amendment from awarding attorney fees against a state); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (§ 1988 permits an attorney fee award in statu-

tory § 1983 actions; § 1988 attorney fee awards are proper in either federal or state court).

It is well settled that § 1988 requires the court to award fees to the prevailing party "unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). See also *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980).

Such "special circumstances" are not to be found in the case at bar. In *Gibbs v. Town of Frisco City*, 626 F.2d 1218, 1221 n. 4 (5th Cir. 1980), the Court of Appeals for the Fifth Circuit stated:

[S]olely by its nature, a classical police brutality case does not present the strong showing of special circumstances that justifies denial of a fee award.

Moreover, the jury finding that Officer Bolt acted in good faith is not a special circumstance to prevent an award of attorney fees. See, e.g., *Ellwest Stereo Theatre, Inc. v. Jackson*, 653 F.2d 954, 955 (5th Cir. 1981) ("The good faith of government defendants acting in their official capacity is not a relevant factor for the district court to consider when determining whether special circumstances exist"); *Riddell v. National Democratic Party*, 624 F.2d 539, 545 (5th Cir. 1980) ("State officials cannot show special circumstances sufficient to prevent an award of fees merely because the officials enforced the statute in good faith compliance with their official duty").

2. Williams is a "Prevailing Party" Because He Prevailed on His State Pendent Claim of Assault and Battery

Williams clearly prevailed on the state pendent claim of assault and battery. This Court has held that a plaintiff's

success on a pendent state claim entitles him to attorney fees under § 1988.

In *Maher v. Gagne*, 448 U.S. 122 (1980), this Court considered the question whether attorney fees may be assessed against state officials after a case has been settled by the entry of a consent decree, without any determination that the plaintiffs constitutional rights have been violated. In holding that attorney fees are proper under such circumstances, this Court stated:

And clearly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided. We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.

448 U.S. at 132.

Additionally, this Court observed:

The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:

"To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans v. Lavine*, *supra*; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers v. Gibbs*, *supra*, at 725." H.R. Rep. No. 94-1558, p. 4, n. 7 (1976).

448 U.S. at 132-33 n.15.³

³ Petitioner Dallas County quotes the statement in *Maier v. Gagne*, 448 U.S. 122 (1980), that "there is no need to reach the question whether a federal court could award attorney's fees against a state based on a statutory, non-civil-rights claim." (Petition for a Writ of Certiorari 14.) Petitioner, however, fails to quote the portion of this Court's opinion directly following the portion quoted above which states that the *Maier* petitioner *alleged* violations of due process and equal protection and that these allegations were "sufficiently substantial to support federal jurisdiction." 448 U.S. at 131. In the case at bar, not only did Respondent Williams allege constitutional violations, the jury found constitutional violations by its finding of Bolt's use of excessive force.

The facts of *Milwe v. Cavuoto*, 653 F.2d 80 (2d Cir. 1981), are strikingly similar to those of the case at bar. In *Milwe*, a jury found the law enforcement officer had used excessive force in violation of the plaintiff's constitutional rights and that the defendant also had committed the pendent state tort claim of assault. The jury ordered compensatory damages of one dollar (\$1.00) on the federal claim and One Thousand Three Hundred Twenty dollars (\$1,320.00) on the state claim. The trial court denied the plaintiff's motion for attorney fees. Reversing the trial court and rejecting the defendant's argument that an attorney fee award was inappropriate "since the jury ordered substantial damages only on the pendent state assault claim and not on the constitutional violation," the court followed this Court's *Maher* decision and held that the trial court had abused its discretion in failing to assess attorney fees against the government defendant.

Numerous other circuit courts have held that a plaintiff's success on a pendent state claim entitles him to attorney fees under § 1988. See, e.g., *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir. 1980) ("the Courts have held that when a party files a case under a federal statute covered by § 1988 and also files a pendent state claim which is dispositive, the [Fee Awards] Act nonetheless entitles the prevailing party to attorneys' fees"); *Lund v. Affleck*, 587 F.2d 75, 76-77 (1st Cir. 1978) (Although "plaintiffs did not prevail under the federal Civil Rights Act but upon a pendent nonconstitutional statutory claim" the attorney fee award was proper in that "the § 1983 claim was substantial and . . . the successful pendent claim arose from the same nucleus of facts"); *Seals v. Quarterly County Court*, 562 F.2d 390, 393-94 (6th Cir. 1977) (Plaintiff prevailed on a state claim based on the same operative facts as the federal claim on which plaintiffs did not prevail, and court stated that "Congress

clearly has the power in such a circumstance to authorize attorney's fees as a matter of federal law, and it equally clearly has done so"); *Bond v. Stanton*, 555 F.2d 172, 174 (7th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423, 426 (8th Cir. 1978) (Quoting a report of the House Judiciary Committee, the court stated: "To the extent a plaintiff joins a claim under one of the statutes enumerated in [the Act] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees.'").

Although Petitioner Dallas County asserts that Respondent Williams recovered "nothing" on his § 1983 claim, the Fifth Circuit disagreed:

[A]lthough Williams' monetary recovery was relatively small, it is clear that the attorneys succeeded in vindicating Williams' established constitutional rights. The jury's response to Special Issue 1 clearly indicates that Williams' constitutional protections were infringed. Additionally, it is difficult to place a monetary amount upon the benefit that the public receives when public officials are reminded that acts of unwarranted violence will not go unnoticed in the American system of justice. . . . As perceived correctly, Williams' counsel not only prevailed in the instant case, but succeeded in vindicating the established, important constitutional rights guaranteed to all citizens. Such a result furthers the policies behind section 1983 and provides incentive for other victims of improper governmental conduct to seek redress pursuant to constitutional authority. The policies behind section 1988 are compromised when a district court places un-

due emphasis upon the amount of the monetary recovery in arriving at its attorney's fees award.

Fifth Circuit opinion, Petitioner's Appendix A-14.⁴

Thus, under settled law, Williams clearly is entitled to recovery of attorney fees pursuant to § 1988 because not only were his important constitutional rights vindicated but also because he recovered damages under the pendent state claim of assault and battery. The substantial nature of the federal claim is demonstrated by the jury's finding that Officer Bolt used excessive force against Williams. Moreover, it cannot be questioned that the assault and battery and excessive force claims arose out of a "common nucleus of operative fact."

3. Williams is a "Prevailing Party" Because the Jury Found that Bolt Used Excessive Force

On Respondent Williams' § 1983 claim the jury found that Officer Bolt used excessive force against Williams; that is, he used force greater than was reasonably necessary to prevent injury or maintain discipline, and the force used was greater than that which a detention officer of ordinary prudence would have used. (Jury charge, Petitioner's Appendix D-6-7, 10). Additionally, the jury found that Officer Bolt acted in good faith and that Respondent

⁴ Petitioner cites *Hanrahan v. Hampton*, 446 U.S. 754 (1980), for the proposition that "one is not a prevailing party if he fails to recover on the merits of his claim." (Petition for a Writ of Certiorari 14). In *Hanrahan*, this Court held that respondents were not "prevailing" parties because they had not prevailed on the merits of any of their claims and the court of appeals had held only that the respondents were entitled to a trial of their cause. Significantly, this Court in *Hanrahan*, noting congressional history that "Parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief" (H.R. Rep. No. 94-1558, p. 7 (1976)), observed "that Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of *at least some of his claims*." 446 U.S. at 758 (emphasis added).

Williams was not entitled to any monetary compensation for Officer Bolt's use of unreasonable force against him.

The trial court admitted it erred in submitting a charge to the jury in regard to the good faith defense under § 1983. (District court opinion, Petitioner's Appendix B-14). In *Wood v. Strickland*, 420 U.S. 308, 322 (1975), this Court held that an official is liable under § 1983 "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights" of the person affected. This Court in *Wood* went on to hold that an official will not be shielded from liability if he acts "with such disregard of the [plaintiffs] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U.S. at 322. See also *Harlow v. Fitzgerald*, _____ U.S. _____, 102 S.Ct. 2727, 2738 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

Thus, the trial court was correct in concluding "that the use of excessive force against prisoners necessarily involves the violation of well-established constitutional norms regarding the treatment of prisoners." (District court opinion, Petitioner's Appendix B-19). Deputy Bolt's behavior in grabbing Williams, slamming him against a wall, and throwing him to the floor where he kicked and beat him clearly violated Williams' "constitutional right to be free from such unjustified assaults." *Id.* Thus, "[a]s a matter of law no 'good faith' defense was applicable in this action." *Id.*

B. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN ITS HOLDING THAT DALLAS COUNTY SHOULD BE LIABLE FOR PAYMENT OF ATTORNEY FEES

It is clearly established that an attorney fee award may lie against the public employer of Officer Bolt even if it is not named as a party in the litigation. *See Hutto v. Finney*, 437 U.S. 678, 694 (1978).

Petitioner Dallas County asserts that Respondent Williams sought no relief against Dallas County nor did he seek relief against Officer Bolt in his official capacity. The Pre-Trial Order to which Petitioner Dallas County refers states as a stipulated fact that “[a]t all relevant times, . . . Bolt [was] acting under color of State law.” Moreover, the Pre-Trial Order states as a stipulated fact that Officer Bolt was a Deputy Sheriff for the Dallas County Sheriff’s Office on the date of the altercation between Officer Bolt and Respondent Williams.

Although Dallas County was not named as a party, the Fifth Circuit noted that Deputy Bolt was represented by the Dallas County District Attorney’s Office pursuant to Tex. Rev. Civ. Stat. Ann. art. 332c § 2 (Vernon Supp. 1982) (emphasis added) which provides:

In any suit instituted by a nonpolitical entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney or both, shall, subject to the provisions contained in Section 3, represent the official or employee of the county *if the suit involves any act of the official or employee while in the performance of public duties.*

As stated by this Court in *Hutto v. Finney*, 437 U.S. 678, 699 and n. 32 (1978):

The Attorney General is hardly in a position to argue that the fee awards should be borne not by the State, but by individual officers who have relied on his office to protect their interest throughout the litigation.

* * * *

Although the Eleventh Amendment prevented Respondents from suing the State by name, their injunctive suit against prison officials, was, for all practical purposes, brought against the State. The actions of the Attorney General himself show that his office has defended this action since it began.

Here, similarly to *Hutto*, Petitioner Dallas County, through the District Attorney's Office, represented Officer Bolt throughout this litigation. Now, Petitioner seeks to have its employee bear the burden of an attorney fee award.⁵

In *Hutto*, this Court held that the Eleventh Amendment does not prevent an award of attorney fees against state prison officials acting in their official capacity. This Court observed:

The legislative history is equally plain: '[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or

⁵ Respondent Williams' argument that the fee award should lie against Dallas County is no surprise to Petitioner; Williams had argued vigorously in the trial court that Dallas County should bear the attorney fee award.

local government (whether or not the agency or government is a named party).’ S. Rep. No. 94-1011, p. 5 (1976) (footnotes omitted). The House Report is in accord: ‘The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.’ H. R. Rep. No. 94-1558, p. 7 (1976). . . . Congress’ intent was expressed in deeds as well as words. It rejected at least two attempts to amend the Act and immunize state and local governments from awards.

437 U.S. at 694 (note omitted). See *Knighton v. Watkins*, 616 F.2d 795, 799-800 (5th Cir. 1980) (“Congress intended defendant state governmental bodies, rather than prevailing parties, to bear the burden of civil rights litigation, even when budgets are small”).

Petitioner Dallas County is incorrect in its assertion that the Court of Appeals for the Fifth Circuit relied only upon Williams’ original *pro se* complaint that Bolt was sued in his official capacity. Indeed, the Fifth Circuit looked to the substance of the matter and not to whether the magic words “in his official capacity” were employed in the style of the case. The Fifth Circuit stated:

[I]t is clear that Deputy Bolt was on duty and responding to the orders of his superior, Officer Riggins, when he encountered Williams. This is not a case in which the tort did not arise out of the government employee’s performance of his duties. Although Deputy Bolt arguably may have exceeded his authority by using excessive force, it has long been settled that he was still acting in an official capacity. See *Ex Parte Young*, 209 U.S. 123 (1908).

Fifth Circuit opinion, Petitioner’s Appendix A-18.

Although Officer Bolt went beyond his duties by using excessive force, he clearly was acting within his official capacity at the time of the assault on Williams. Officer Bolt, a jail detentions officer and a deputy sheriff, was called for assistance while on duty at the jail to aid in handling a situation involving inmate discipline in a jail cell. Thus, Officer Bolt was necessarily acting in his official capacity when he encountered Williams at the jail cell.

The frequently cited legislative history quoted above indicates that attorney fees may be collected "from the State or local government." See *Hutto*, *supra*, 437 U.S. at 694 (emphasis added). Courts have confirmed the implications in *Hutto* that attorney fees may be awarded against governmental entities other than the state. *Gates v. Collier*, 616 F.2d 1268, 1276 (5th Cir. 1980) ("Fees are recoverable against government officials acting in their official capacity") (emphasis added). In *Universal Amusement Co. v. Hofheinz*, 616 F.2d 202, 204 (5th Cir. 1980), the court remarked:

[I]t would follow from the legislative history quoted above and the implications of *Hutto*, that local governments would not be immune either. *Miller v. Carson*, 563 F.2d 741, 755-56 (5th Cir. 1977).

See also *Collins v. Thomas*, 649 F.2d 1203, 1205 (5th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 1992 (1982) ("The § 1988 award against Thomas in his official capacity lies against the Dallas County treasury even though Dallas County was not named as a party in the plaintiffs' suit"); *Seals v. Quarterly County Court*, 562 F.2d 390, 394 (6th Cir. 1977) ("Defendants' argument that the Eleventh Amendment bars an award of attorney fees against the county has, of course, been disposed of by the

Supreme Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)").

The fact that the District Attorney's office of Dallas County has represented Officer Bolt throughout the course of the proceeding indicates that Petitioner Dallas County ultimately is the responsible party to bear the costs, including attorney fees incurred by Respondent Williams in this case.

Petitioner Dallas County cites various cases in support of its contention "that there is no *respondeat superior* liability under Section 1983 claims." (Petition for a Writ of Certiorari 20.) Thus, Petitioner Dallas County asserts that it is not liable for attorney fees because there "was no county custom or policy authorizing, permitting or ratifying Bolt's acts"; that "Sheriff Thomas did not participate in, authorize or ratify Bolt's acts"; and that "Bolt was not an official whose acts and edicts may fairly be said to represent County policy". *Id.* at 21.

The *respondeat superior* cases cited by Petitioner are not applicable to the case at bar in that those cases concern damage awards and not an award of attorney fees. As this Court made clear in *Hutto*, "attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." 437 U.S. at 694.

In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162 (1982), this Court stated:

Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award

is uniquely separable from the cause of action to be proved at trial. See *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978).

As the Court of Appeals for the Fifth Circuit recently stated:

"[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)."

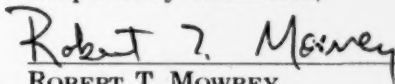
Knighton v. Watkins, 616 F.2d 795, 797 (CA 5 1980).

455 U.S. at ____; 102 S.Ct. at 1166-67 (note omitted).

CONCLUSION

For the foregoing reasons, Respondent Donald Williams prays that this Honorable Court deny Petitioner Dallas County, Texas' Petition for a Writ of Certiorari.

Respectfully submitted,



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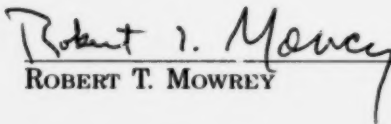
PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

Before me the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared Robert T. Mowrey, who being by me duly sworn, upon oath stated: I, Robert T. Mowrey, am the attorney of record for Respondent Donald Williams and have made application to the Bar of the Supreme Court of the United States. I state upon oath that upon the 27th day of May, 1983, I served copies of the foregoing Respondent Donald Williams' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the courts below at the addresses indicated, to wit:

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ROBERT T. MOWREY

SUBSCRIBED and SWORN TO before me by the said
Robert T. Mowrey, this the 27th day of May, 1983.

Rita Lambert
Notary Public in and for the State of Texas

My Commission
Expires:

7-22-84 RITA LAMBERT
Print Name of Notary



NO. 82-1792

In The
Supreme Court of the United States
OCTOBER TERM 1982

DALLAS COUNTY, TEXAS,

Petitioner

v.

DONALD WILLIAMS,

Respondent.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

**PETITIONER'S BRIEF IN REPLY TO RESPONDENT
DONALD WILLIAM'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

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June 10, 1983

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**PETITIONER'S BRIEF IN REPLY TO RESPONDENT
DONALD WILLIAM'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

ARGUMENT

1. REPLY TO ARGUMENTS RAISED UNDER POINT
"A" OF RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT. (Germane to question number
I. in Petition for Certiorari)

The cases cited by Respondent under Section A of his argument are inapposite, because Respondent fails to make the distinction between a party prevailing *solely* on a pendent state tort claim while *failing* to prevail on his Section 1983 claim, as in the case at bar; and a party prevailing on his pendent, dispositive state tort claim when the court

avoided a determination of his § 1983 claim, as in *Maher vs. Gagne*, 448 U.S. 122 (1980), because such a determination was not necessary to dispose of the case.

As the legislative history of the Attorney Fee Act (42 U.S.C. §1988) makes clear, attorney fees may be awarded when a court finds for a plaintiff on a dispositive pendent claim while *refraining* from the constitutional question. H. R. Rep. No. 94-1558, p. 4, n. 7 (1976), Brief in opposition, page 10.

In the case at bar, the District Court carefully distinguished the situation discussed in the legislative history from the one presently before it, since a determination of the constitutional question was not avoided by the District Court. See Petitioner's Appendix B-21. Rather, the jury found the Plaintiff suffered no damages as a result of his constitutional claim, and that Defendant Bolt acted in good faith.¹

The jury finding of "excessive force" against Bolt in this case is not a finding on which prevailing party status can be supported, since the jury went on to find that Respondent suffered no damages as a result of Bolt's use of excessive force. Petitioner's Appendix D-12.

Therefore, the facts before the Court in *Milwe vs. Cavuoto*, 653 F.2d 80 (2nd Cir. 1981) differ substantially from the facts in this case. In *Milwe* the jury found the Plaintiff was *injured* by the unconstitutional activity of Defendant and was thereby entitled to compensation, however nominal. This entitled Plaintiff to attorney fees since a *compensable* constitutional injury was found to exist. In the present case, Respondent suffered no compensable constitutional injury.

¹The good faith defense was later withdrawn by the Court as a matter of law. Petitioner's Appendix B-19.

No injunctive relief was awarded. No declaratory relief was awarded. There is no basis on which to support a conclusion that Respondent prevailed on his constitutional claim. Therefore, he is left with nothing more than a small recovery on a state tort claim. In this suit for damages, Respondent asserted alternative theories of recovery: a Section 1983 claim and a pendent state law claim. He failed to recover on his constitutional theory, and recovery on the pendent claim, standing alone, is not sufficient to support an award under Section 1988. *Haywood vs. Ball*, 634 F.2d 740, 743 (4th Cir. 1980), *Luria Brothers and Company, Inc. vs. Allen*, 672 F.2d 347, 357 (3rd Cir. 1982).

2. REPLY TO ARGUMENTS RAISED UNDER POINT "B" OF RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. (Germane to question number II. in Petition for Certiorari.)

Respondent's reliance upon *Hutto vs. Finney*, 437 U.S. 678 (1978) is misplaced. In *Hutto vs. Finney*, the Commissioner of Corrections and members of the Arkansas Board of Corrections were sued for injunctive relief in their official capacities due to practices occurring in Arkansas prisons. In the present case, a deputy sheriff, sued individually for damages only, was the highest official who remained in the suit². In *Hutto*, sweeping prison reforms monitored by the court's retaining jurisdiction for a period of time encompassing some nine years of supervision was the relief obtained by Plaintiffs. In the present case, Respondent was awarded

²Although Sheriff Thomas was sued, the District Court found, as a matter of law, "... Thomas cannot be held liable on a theory that a Sheriff is absolutely responsible for all acts of his deputies as urged by Williams." Petitioner's Appendix B-14.

\$500.00 for an assault and battery claim against a single deputy sheriff. Petitioner's Appendix page D-14. In *Hutto*, the attorney fees award was predicated in part upon the Defendants' bad faith. In the present case, there was not only an explicit finding that no malicious conduct existed³, but there was also an explicit finding that Bolt acted in good faith.⁴

Hutto involved a clearly prevailing party who was granted *injunctive* relief, while in the present case, Respondent failed to prevail on his constitutional claim for *damages*. Most importantly, the 11th Amendment argument made by Respondent in his Brief in Opposition, based in part on *Hutto*, cannot stand under the circumstances of the present case.

Hutto involved injunctive relief. The case presently before the Court was purely an award of damages on a state law claim. The Texas Torts Claims Act provides a method by which the state has chosen to selectively abrogate its sovereign immunity and allow specific tort claims to be filed against it and its agencies. However, the act provides in Section 14(10):

EXEMPTIONS

Sec. 14. The provisions of this Act shall *not* apply to:

... (10) Any claim arising out of assault, battery, false imprisonment, or any other intentional tort including, but not limited to, disciplinary action by school authorities.

Vernon's Texas Civil Statutes, art. 6252-19, Sec. 14(10) (emphasis added).

³Petitioner's Appendix page D-12.

⁴Petitioner's Appendix page D-11. See further footnote 1.

It is undisputed that a state, its agencies and certain officials enjoy immunity from damages sought under Section 1983 due to the protection of the 11th Amendment. *Quern vs. Jordan*, 440 U.S. 332 (1979). Therefore, if Respondent had sued Deputy Bolt for damages in his official capacity, as he now claims, and if such suit was determined to be a suit against the county, which is an arm of the State of Texas, same would, therefore, be barred by the 11th Amendment. The suit for damages, if brought against these employees in their official capacities and against the governmental entity, would, therefore, be barred *ab initio* by the 11th Amendment. Since the suit would be barred, the County could not be liable for the damages awarded or for attorney fees in conjunction with that award, especially absent the imposition of injunctive or declaratory relief. The relief requested by Respondent could not be granted by the Court.

In Texas, counties are unique in structure and in relationship to the State. See *Doe vs. Sullivan*, 472 F.Supp. 975 (W.D. Tex. - 1979), holding that counties are arms of the State and as such are entitled to 11th Amendment immunity.

Under the present Texas Constitution of 1876, Article XI, Section 1, counties are described as "political subdivisions of the State". The explanatory comment to that section states:

In Texas, a county is an *involuntary* political subdivision of the state, an agency or arm of state government created by the sovereign will for the purpose of discharging such governmental obligations of the state ... (emphasis added)

Texas Constitution Art. XI Section 1 (1876) 2 Vernon's Annot. Stat. (1955).

In 1884, the Supreme Court of Texas delineated the distinctions between counties and cities in Texas in the case of *City of Galveston vs. Posnainsky*, 62 Tex. 118, 126-7 (1884), stating:

The one [the county] is created for a public purpose as an agency of the state, through which it can most conveniently and effectively discharge the duties which the state, as an organized government, assumes to every person, and by which it can best promote the welfare of all . . .

Justice Stayton in the *Posnainsky* case said of counties:

Counties are created by the general law and while they are municipal corporations in a restricted sense, they are involuntarily so, and sustain to the state a relationship which a town or city incorporated does not sustain. They are created to carry out a policy common to the whole state, and not mainly to advance the interest of the particular locality and to bring advantage or emolument to the inhabitants of the municipality.

Id.

Federal courts have also realized the unique structure of Texas counties in regard to their relationship to the State. In *Crane vs. State of Texas*, 534 F.Supp. 1237, 1243 (N.D. Texas — 1982), Judge Higginbotham noted,

Cities are created primarily for the benefit of their citizens while counties are primarily the “arms” or agents of the state. (cites omitted)

The Court went on to recognize that,

. . . students of state government believe the state is moving toward even greater control over the county administration of certain state functions . . .

Id. at page 1245.

In *Crane*, it was held by the Court that the individual Defendants, while county employees, were not acting for the county qua county, but rather were meeting state created duties. Therefore, the county could not be held liable for their acts pursuant to *Monell vs. Department of Social Services*, 436 U.S. 658 (1978), under the facts of that case.

The Fifth Circuit has remanded a case involving the Harris County Treasurer to determine whether the counties of Texas, due to their unique qualities, should be afforded 11th Amendment immunity. *VanOoteghem vs. Gray*, 654 F.2d 304 (5th Cir. 1981) cert. den. 455 U.S. 909 (1982).

For these reasons, Dallas County, as an agency of the State of Texas, cannot be held liable herein due to its immunity under the 11th Amendment to the United States Constitution.

Respondent has misconstrued Petitioner's argument that Dallas County cannot be held liable under the clear teaching of *Monell vs. Department of Social Services of the City of New York, et al.*, 436 U.S. 658 (1978), absent a county policy or custom authorizing the behavior complained of, or the involvement of a person whose acts and edicts can fairly be said to represent county policy. Certainly the citation of *Collins vs. Thomas*, 649 F.2d 1203 (5th Cir. 1981) cert. den. U.S., 102 S.Ct. 992 (1982) is inapposite, since in that case Sheriff Thomas was the party against whom relief was fashioned. Here, there is only a deputy sheriff involved, and it cannot be seriously argued that his acts or edicts may fairly be said to represent county policy, nor was it ever argued that the county maintained a policy or custom that resulted in the injuries complained of by

Respondent. Therefore, no liability can be imputed to Dallas County, either for the damages or attorney fees awarded.

Respondent has argued that although the County was not named in the suit, it was represented below at all times by the District Attorney. The presence of the District Attorney in the suit does not mean that the county was represented. Under Texas law, the District Attorney is not required to represent the county in a lawsuit. Rather the District Attorney is required by law to represent County *employees* or *officials*, if the suit involves any act of the employee or official in performance of public duties. Art. 332 C, Tex. Rev. Civ. Stat.

The District Attorney *may* advise the county, *if requested*, and no such request was made in the present case. This authorization is found in Art. 334, Tex. Rev. Civ. Stat.

Certainly, the District Attorney vigorously represented the individual deputies named herein. Until the United States Court of Appeals for the Fifth Circuit entered its erroneous opinion in this case, there was no necessity for representation of the County since it had not been named a party and since no individual Defendant was sued in his official capacity.

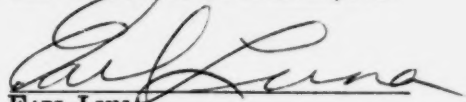
CONCLUSION

Requiring a county not sued below to pay damages and/or attorney fees awarded solely on a state tort law claim against a deputy sheriff sued individually creates a hazardous, unwarranted expansion of 42 U.S.C. §1983, and 42 U.S.C. §1988, and conflicts with this Court's decisions in *Hanrahan vs. Hampton*, 446 U.S. 754 (1980) and *Monell vs. Department of Social Services of New York*, 436 U.S. 658 (1978).

Therefore, Dallas County's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted and the finding of liability against Dallas County should be reversed.

Respectfully submitted,

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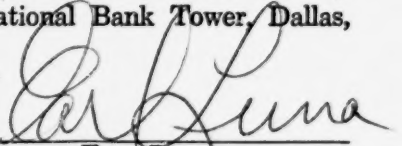
ATTORNEYS FOR PETITIONER
DALLAS COUNTY, TEXAS

PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS

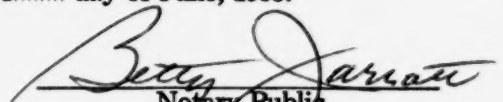
Before me, the undersigned Notary Public in and for Dallas County, Texas on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been retained as attorney of record for Petitioner Dallas County.

I further state upon oath that upon the 10th day of June, 1983, I served copies of the foregoing Petitioner's Brief in Reply to Respondent Donald William's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Respondent by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated to-wit: Ms. Sue LaGarde, Assistant District Attorney, Ninth Floor, County Courthouse, Dallas, Texas 75202, and Mr. Robert T. Mowrey and Mr. Mitch Bell, of Locke, Purnell, Boren, Laney and Neely, 3600 Republic National Bank Tower, Dallas, Texas 75201.



EARL LUNA

SUBSCRIBED and SWORN TO before me by the said Earl Luna, this the 10th day of June, 1983.



Notary Public
for Dallas County, Texas